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RAILROAD REPORTS

(Vol. 45 American and English
Railroad Cases, New Series)

A COLLECTION OF ALL

**CASES AFFECTING RAILROADS OF EVERY KIND,
DECIDED BY THE COURTS OF
LAST RESORT**

IN THE

UNITED STATES.

EDITED BY

THOMAS J. MICHIE.

VOLUME XXII.

**THE MICHIE COMPANY, PUBLISHERS,
CHARLOTTESVILLE, VA.**

1907.

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RAILROAD REPORTS

COMMONWEALTH *ex rel.* ATTORNEY GENERAL *v.* ATLANTIC COAST LINE R. Co.

(Supreme Court of Appeals of Virginia, Nov. 22, 1906.)

[55 S. E. Rep. 572.]

Constitutional Law — Constitutional Questions — Determination — Corporation Commission—Jurisdiction.—The State Corporation Commission, organized under Const. § 156 (c) [Va. Code 1904, p. cclii], providing that in all matters pertaining to the public visitation, regulation, or control of corporations, within the jurisdiction of the commission, it shall have the powers and authority of a court of record, etc., has jurisdiction in a proceeding before it, by the state, to compel a carrier to issue mileage books at a reduced rate, as required by Act March 15, 1906 (Acts 1906, p. 541, c. 256), to pass on an issue raised as to the constitutionality of such act.

Same—Carriers—Regulation of Rates—Due Process of Law.*—Act March 15, 1906 (Acts 1906, p. 451, c. 256), requiring all railroads operating in the state to keep on sale at all times mileage books of 500 miles and over to be sold at not more than 2 cents a mile, and good for the use of any dependent household member of the family of the party to whom it is issued, dwelling under the same roof, within one year from the date of the same, was unconstitutional, as depriving railroad companies of their property without due process of law.

Courts—Federal Courts—Rules of Decision.—A decision of the United States Supreme Court holding a state statute regulating railroads unconstitutional, as a deprivation of property without due process of law, is conclusive on the courts of another state in determining the validity of a similar statute of that state.

Appeal from State Corporation Commission.

Petition by the commonwealth on relation of the Attorney General against Atlantic Coast Line Railroad Company. From a judgment of the State Corporation Commission, dismissing the petition, the commonwealth appeals. Affirmed.

William A. Anderson, Atty. Gen., for the Commonwealth.

William B. McIlwaine, for appellee.

CARDWELL, J. This is an appeal from a judgment of the State Corporation Commission denying the prayer of a petition filed on behalf of the commonwealth by the Attorney General against the Atlantic Coast Line Railroad Company, the object of which was to compel the defendant railroad company to comply with the act of the General Assembly, approved March 15, 1906 (Acts 1906, p. 451, c. 256), requiring all railroads operating in this

*See foot-notes appended to *Lake Shore & M. S. Ry. Co. v. Smith* (U. S.), 14 Am. & Eng. R. Cas., N. S., 511; *Beardsley v. New York, etc., R. Co.* (N. Y.), 17 Am. & Eng. R. Cas., N. S., 149.

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state to keep on sale at all times mileage books of 500 miles and over at a charge of not more than 2 cents a mile.

The State Corporation Commission has, in a written opinion made a part of the record, after stating how the case arose, set forth in a very satisfactory manner the reasons why the relief asked on behalf of the commonwealth could not be granted, and we therefore adopt its opinion as a part of the opinion of this court.

"The petition states that the regular maximum rate of the defendant company is 3 cents per mile. The company was summoned by the commission to show cause why it should not be required to comply with the said statute, and have penalties imposed upon it for its failure to perform its public duty in this respect. In its defense the company alleges that the act in question is unconstitutional. Several grounds are assigned by the defendant upon which its assertion of the unconstitutionality of the law is based. The two main contentions are:

"(1) That the statute in question is in contravention of the provisions of the fourteenth amendment to the Constitution of the United States, in that it deprives the defendant of its property without due process of law, and without just compensation, and also denies to the defendant the equal protection of the laws.

"(2) That the General Assembly of the State, under the provisions of the organic law of the state, has no authority by legislation to prescribe or fix rates for transportation, but that authority to exercise the legislative functions of the state in that respect is conferred exclusively upon the State Corporation Commission.

"The learned Attorney General, as the highest law officer of the commonwealth, urged upon the commission that, in this proceeding, it was invested with all the powers, and had imposed upon it all the responsibility of a court of record. He earnestly contended that the commission not only had the judicial authority to pass upon these constitutional questions, but that it was its manifest duty to do so, in so far as it was necessary to reach a final conclusion. This position of the Attorney General was not combated by the learned counsel for the defendant company, but was conceded to be correct. Indeed, it is no longer open to question. 'In this commonwealth the State Corporation Commission, created by constitutional authority, is the instrumentality through which the state exercises its governmental powers for the regulation and control of public service corporations. For these purposes, it has been clothed with legislative, judicial, and executive powers'—was held by the Court of Appeals of this state in the case of *Norfolk & P. R. R. Co. v. Com.*, 103 Va. 289, 49 S. E. 39, which went up to that court on appeal from the commission. The Constitution of Virginia, in section 156 (c) [Va. Code 1904, p. cclii] provides, as to the commission, that 'In all matters pertaining to the public visitation, regulation or control of corporations, and within the juris-

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diction of the commission, it shall have the powers and authority of a court of record,' etc. This section gives the commission, in the exercise of its judicial functions, authority to administer oaths, compel the attendance of witnesses, enter up and enforce its judgments, and confers upon it other ordinary attributes of a court of general jurisdiction. In all matters, 'within the jurisdiction of the commission,' says the Constitution, employing the word 'jurisdiction' which is appropriately used with reference to a judicial tribunal as distinguished from legislative or administrative authority. The commission, by section 156 (b), has conferred upon it the legislative authority to fix and prescribe rates and classifications, and to make regulations for transportation and transmission companies to the full extent to which that power exists in the state government. But, in the exercise of this legislative power, it cannot make its rates effective or put its regulations into force until it has summoned the company or companies to be affected before it. This is done by a notice which affords due process of law to the company. The hearing or investigation upon that notice gives to the final action of the commission the force and effect of a judgment of a judicial tribunal.

"Passing upon the reasonableness of rates and classifications to be prescribed by it, and of regulations, orders and requirements to be promulgated by it—in the exercise of its legislative authority—constitute the principal matters 'within the jurisdiction' of the commission (as a judicial tribunal) as outlined in the Constitution. The General Assembly has brought many additional matters within the jurisdiction of the commission.

"In this proceeding the Attorney General invokes the jurisdiction of the commission under sections 16 and 19 of the act approved April 15, 1903, (Laws 1902-04, pp. 141, 142), and carried into the Code of 1904, at page 714, as section 1313 (a). By that statute the commission is authorized to compel all corporations to perform any public duty or requirement, and to impose fines upon them for failing to do so. This brings within the judicial jurisdiction of the commission the enforcement of all statutes imposing public duties upon public service corporations. The commission cannot impose a fine upon a corporation without summoning the company before it, hearing what it has to say in its defense, and passing judgment thereon judicially; in other words, giving the company a fair trial as in any other court. To proceed otherwise under this statute would be repugnant to fundamental principles, and would make the statute itself in violation of the Constitution, both of the state and the United States. The jurisdiction of the commission is further enlarged by clause 19 of section 1294 (b) of the Code of 1887 [Va. Code 1904, p. 660] being section 19, chapter 2, page 974, of the act concerning public service corporations. The commission is there given jurisdiction to entertain a petition filed before it complaining of violation of any of the provisions of that act. 'If the grievance complained of be established,' says the

Legislature in this act, 'the State Corporation Commission, sitting as a court of record, shall have jurisdiction by injunction, etc.' The commission awarded an injunction under this statute against the Virginia Passenger & Power Company restraining it from increasing its rates by discontinuing transfers. See report of State Corporation Commission of 1904, part 1, page 94.

"The commission having summoned the defendant company before it to show cause why a penalty should not be imposed upon it, the commission must hear fairly and pass judicially upon any issues properly raised. It matters not that one of the issues is the unconstitutionality of the act which the commission seeks to enforce. If the act is void, it is a just reason why the company cannot be compelled to comply with it, or be fined for violating it.

"In support of its argument that the act in question here contravenes the fourteenth amendment of the Constitution of the United States, the company relies chiefly upon the authority of the case of *Railway Company v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858. The Supreme Court of the United States, in that case, held unconstitutional a statute of Michigan requiring railroad companies to keep on sale 1,000-mile books or tickets. The opinion delivered by Mr. Justice Peckham declares that legislation of this character violates the constitutional rights of the railroad companies to due process of law and the equal protection of the laws. The statute provided that the tickets might be required to be issued in the name of the purchaser and his wife and children; the ticket to be valid for two years, and the unused portion then to be redeemed. The court says: 'We cannot regard this exceptional legislation as the exercise of a lesser right which is included in the greater one to fix by statute maximum rates for railroad companies. The latter is a power to make a general rule applicable in all cases and without discrimination in favor of or against any individual. It is the power to declare a general law upon the subject of rates beyond which the company cannot go, but within which it is at liberty to conduct its work in such a manner as may seem to it best suited for its prosperity and success. This is a very different power from that exercised in the passage of this statute. The act is not a general law upon the subject of rates, establishing maximum rates which the company can in no case violate. The Legislature having established such maximum as a general law now assumes to interfere with the management of the company while conducting its affairs pursuant to, and obeying, the statute regulating rates and charges, and notwithstanding such rates it assumes to provide for a discrimination, an exception in favor of those who may desire, and are able to purchase, tickets at what might be called wholesale rates—a discrimination which operates in favor of the wholesale buyer, leaving the others subject to the general rule. And it assumes to regulate the time in which the ticket purchased shall be valid and to lengthen it to double the period the railroad com-

pany has ever before provided. It thus invades the general right of a company to conduct and manage its own affairs, and compels it to give the use of its property for less than the general rate to those who come within the provisions of the statute, and to that extent it would seem that the statute takes the property of the company without due process of law.'

"The learned judge reasons at length along the same lines. The opinion establishes that the state may prescribe a maximum scale of rates, but it cannot compel a railroad company to contract with any individual or class for carriage at a charge less than the established or regular scale of fares. The reasoning of the learned judge is not entirely and clearly convincing, nor is the conclusion reached by him very satisfactory, and three of the judges dissented. But we are bound by this decision, as it emanates from the highest tribunal in the country. The case has been referred to in several subsequent cases in the Supreme Court of the United States, without criticism or doubt cast upon it. It has also been followed in New York. In that state a statute somewhat similar to the Michigan and Virginia statutes was assailed as unconstitutional in the case of *Beardsley v. N. Y., L. E. & W. Co.*, 162 N. Y. 230, 56 N. E. 488. The Court of Appeals of New York refers to the opinion of Justice Peckham on the Michigan statute, and is not disposed to agree with all of its reasoning. But the court, in a brief opinion, concludes that it is bound by this opinion of the Supreme Court of the United States on a question arising under the federal Constitution, and held the New York statute to be unconstitutional.

"In referring to the case in 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858, the Attorney General says in his written brief: 'I frankly concede that, unless this case can be distinguished from the Michigan Case, or unless it can be shown that this case is overruled by some other decision or decisions of the United States Supreme Court, the decision of the United States Supreme Court in the Michigan Case must be considered as conclusive of this case, and the churchman act must, in that event, be held to be unconstitutional.' It is sought to distinguish the Virginia statute from the Michigan statute by pointing out that, in the latter law, the right to purchase the mileage tickets seemed to be confined to married men, and that the law itself was a portion of a general statute by which the Legislature had fixed a maximum scale of passenger rates. These differences are incidental and we do not think that they affect the reasoning by which the conclusion is reached by the Supreme Court of the United States.

"The Court says: 'The Legislature has the power to secure to the public services of the corporation for reasonable compensation, so that the public shall be exempted from unreasonable exactions. and it has also the authority to pass such laws as shall tend to secure the safety, convenience, comfort, and health of its patrons and of the public with regard to the railroad. But in all this we find it neither necessary nor appropriate, in

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order that the Legislature may exercise its full right over these corporations, to make such a regulation as this, which discriminates against it and in favor of certain individuals, without any reasonable basis therefor, and which is not the fixing of maximum rates or the exercise of any such power.'

"We conclude that the statute before us is in conflict with the Constitution of the United States, and is therefore void, and we have no authority to punish the defendant company for failure to comply with its terms. We are greatly strengthened in this conclusion by a convincing opinion delivered several days ago upon this question by the learned judge of the corporation court of Staunton in which he reaches a similar result.

"As the conclusion already reached forces us to take no further proceedings in this matter, and so disposes of the whole case, it is unnecessary for us to pass upon the other question raised by the defendant company. The entire lawmaking power of the people of Virginia is vested in their representatives constituting our General Assembly, subject only to such limitation as may be placed upon it by the Constitution of the state. Whether the provisions of the Constitution relative to the powers and authority of this commission and vesting in the commission the legislative power to make rates are so worded as to exclude the General Assembly from exercising its legislative power in that respect is a question which it is needless for the commission to pass upon, unless it is so presented as to render its adjudication absolutely essential to the decision of the case."

It will be observed that the commission considered that the controlling question in the case is whether or not the act of the General Assembly under review, and which we will for convenience refer to as the "Virginia Mileage Act," is violative of the provisions of the fourteenth amendment of the Constitution of the United States, by depriving the appellee company of its property or liberty without due process of law, or by depriving it of the equal protection of the laws. The learned Attorney General concedes that the case of *Railway Company v. Smith*, supra, which we shall speak of for convenience as the "Michigan Case," must be considered as conclusive of this case, unless they can be distinguished, or it can be shown that the Michigan Case is overruled by some other decision or decisions of the United States Supreme Court. Therefore there is but little for us to add to what has been said in the opinion of the State Corporation Commission, supra.

The leading case relied on for the commonwealth is *Munn v. Illinois*, 94 U. S. 113, 24 L. Ed. 77, which announced the broad doctrine that a state government has the inherent right to regulate and control railroad companies and other public service corporations, and to prescribe the rates and charges that they should be allowed to make. In that case, the power of the Legislature of Illinois to fix by law the maximum of charges for storage of grain in warehouses in Chicago, and other places in the state, was the question at issue, and, upon the ground that

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when private property is devoted to public uses it is subject to public regulation, it was held that, under the limitations upon the legislative power of the states imposed by the Constitution of the United States, the Legislature of Illinois could fix by law the maximum of charges for the storage of grain in warehouses, at Chicago and other places in the state. A lengthy dissenting opinion was filed by Mr. Justice Field, concurred in by Mr. Justice Strong, taking the ground that the ruling of the majority was subversive of the rights of private property theretofore believed to be protected by constitutional guaranties against legislative interference, and in conflict with the authorities cited in its support, and that the decision of the court gave unrestrained license to legislative will.

By subsequent decisions of the same court, the doctrine laid down in *Munn v. Illinois* has been frequently and materially modified. *Railroad Commission Cases*, 116 U. S. 307, 6 Sup. Ct. 334, 388, 1191, 29 L. Ed. 636; *Chicago, Milwaukee & St. P. R. Co. v. Minn.*, 134 U. S. 418, 10 Sup. Ct. 702, 33 L. Ed. 970; *Smyth v. Ames*, 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819; *San Diego L. Co. v. National City*, 174 U. S. 739, 19 Sup. Ct. 804, 43 L. Ed. 1154.

With the modifications engrafted upon the rule referred to, the rule itself has been approved in a number of cases down to and including *Minneapolis & St. L. R. Co. v. Minn.*, etc., 186 U. S. 257, 22 Sup. Ct. 900, 46 L. Ed. 1151; and in those cases decided after the *Michigan Case* we are unable to find anything that can be construed as overruling that case or discrediting it in any degree, the fact being that the case was not referred to because the circumstances in those cases, on the one hand, and the *Michigan Case* on the other, were different, and therefore the language of the decisions different. In the cases modifying the doctrine of *Munn v. Illinois*, the trend of judicial thought, it may be safely said, is more in harmony with the views expressed in the dissenting opinion of Mr. Justice Field than with the view of the case taken by the majority of the court.

The most important and pertinent modification to be considered in connection with the case under review appears in the *Railroad Commission Cases*, *supra*, where the opinion by Chief Justice Waite (who also wrote the opinion in *Munn v. Illinois*), after reviewing the ruling in *Munn v. Illinois*, says: "From what has thus been said it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward, neither can it do that which, in law, amounts to a taking of private property for public use without just compensation, or without due process of law."

In *Chicago, Milwaukee & St. P. R. Co. v. Minn.*, *supra*, the rule in *Munn v. Illinois* appears to have been approved by a majority of the court and another very important modification of

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the rule engrafted thereon, to the effect that, where a state created a commission and clothed that commission with authority to prescribe rates and charges to be made by railroad companies, the power thus delegated to the commission should not be exercised arbitrarily without giving the railroad companies affected a day in court and opportunity to be heard, and to appear and show the effect of the schedule of rates and charges prescribed by the commission upon them, and that to do this was depriving them of their property without due process of law, and depriving them of the equal protection of the laws.

The other important modifications of the rule are not relevant to the issue in this case, and were announced in a number of cases in which the rule was variously formulated, many of which are exhaustively reviewed by Mr. Justice Harlan in *Smyth v. Ames*, supra, where that learned judge states the doctrine, as established by the adjudications of the court, as follows: "(1) A railroad corporation is a person within the meaning of the fourteenth amendment, declaring that no state shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. (2) A state enactment, or regulations made under the authority of a state enactment, establishing rates for the transportation of persons or property by railroads that will not admit of the carrier earning such compensation as, under all the circumstances, is just to it and to the public would deprive such carrier of its property without due process of law and deny to it the equal protection of the laws, and would, therefore, be repugnant to the fourteenth amendment of the Constitution of the United States. (3) While rates for the transportation of persons and property within the limits of a state are primarily for its determination, the question whether they are so unreasonably low as to deprive the carrier of its property without such compensation as the Constitution secures, and therefore without due process of law, cannot be so conclusively determined by the Legislature of the state, or by regulations adopted under its authority, that the matter may not become the subject of judicial inquiry."

We are wholly unable to perceive the antagonism claimed, on behalf of the commonwealth, to exist between the cases we have mentioned and a number of others, not necessary to be adverted to, recognizing the rule in *Munn v. Illinois* with its modifications, and the principle announced in the *Michigan Case*. The fact is that the last-named case refers to *Munn v. Illinois* and the cases modifying the rule announced therein, and recognizes the existence of the rule as modified; but, while recognizing the power of the Legislature to prescribe maximum charges which may be made by public service corporations, held that the *Michigan* mileage statute did not belong to that class of legislation enacted in the exercise of this admitted power, but was a taking of the property of the company without due process of law—legislation which is prohibited by the fourteenth amend-

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ment—and therefore violated the constitutional rights of railroad companies to due process of law, and the equal protection of the laws. It was contended in that case, as in the case here, that, as the Legislature would have the power to reduce the maximum charges to the same rate at which the Michigan statute provided for the purchase of 1,000-mile tickets, the railroad company could not be harmed nor its property taken without due process of law when the Legislature only reduced the rate in favor of a few citizens instead of all, but the opinion denied the right of the Legislature to make such an alteration, upon the ground that to do so might involve a reduction of rates to an amount insufficient to give the remuneration to which the railroad company was legally entitled under the decisions of the court.

It will be observed that while the Michigan statute required 1,000-mile tickets to be sold by railroad companies for less than the ordinary rates of fare, for use by the purchaser and his wife and children, if named on the ticket, and made them valid for two years after the date of purchase, the Virginia Mileage Act requires the companies at all times, day and night, at all stations, regular and flag, to keep on sale books of 500 miles and over, and that "it shall be unlawful for any transportation company or corporation operated by steam to charge or collect a greater sum than two cents per mile on such mileage books, and such mileage books shall be good and valid for the use of any dependent household member of the family of the party to whom issued, dwelling under the same roof, within one year from the date of the same." As it appears to us, the provisions of the two statutes are practically the same, and fall within the purview of the Michigan Case, as the reasoning for holding the one violative of the provisions of the fourteenth amendment of the Constitution of the United States applies as well to the other. As stated in the opinion of the State Corporation Commission above, the incident that the Michigan statute had fixed a maximum scale of passenger rates is mentioned in the Michigan Case, but the conclusion reached was in no way rested upon that incident. On the contrary, the opinion says: "The power of the Legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in a community and to carry the members of that class at a less sum than it has the right to charge for those who are not fortunate enough to be members thereof. This is not a reasonable regulation." And again: "Regulations for maximum rates for present transportation of persons, or property, bear no resemblance to those which assume to provide for the purchase of tickets in quantities at a lower than the general rate, and to provide that they shall be good for years to come. That is not fixing the maximum rate, nor is it proper legislation. It is an illegal and unjustifiable interference with the rights of the company." Clearly the dominant idea running through the whole opinion is that

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this is class legislation, and is not for the equal benefit of the whole people; therefore the conclusion is irresistible that the same judgment would have been rendered by the court had the Legislature of Michigan not have fixed a maximum scale of passenger rates.

It is true that the Michigan Case was decided by a divided court, as was the case of *Munn v. Illinois*, and nearly all of the cases sanctioning the doctrine of that case, but, instead of the Michigan Case being discredited by any subsequent decision of the court, in *Wis., M. & P. R. Co. v. Jacobson*, 179 U. S. 288, 21 Sup. Ct. 115, 45 L. Ed. 194, in referring to the power of a state to regulate, etc., railroad companies, the Michigan Case is cited as authority for the proposition of law, that, "while this power of regulation exists, it is also to be remembered that the Legislature cannot, under the guise of regulation, interfere with the proper protection of the business of railroad corporations in matters which do not fairly belong to the domain of reasonable regulation." And the court adds: "The distinction between this case and that of *Lake Shore & M. S. R. Co. v. Smith*, 173 U. S. 684, 19 Sup. Ct. 565, 43 L. Ed. 858, * * * is very plain. There we held that the statute in question was not a reasonable regulation of the business of the company; that it was the exercise of a pure, bald, and unmixed power of discrimination in favor of a few of the persons having occasion to travel on the road, permitting them to do so at less expense than others, provided they could buy a certain number of tickets at one time. It was not legislation for the safety, health, or proper convenience of the public, but an arbitrary enactment in favor of the persons spoken of, who, in the legislative judgment, should be carried at a less expense than the other members of the community, and there was no reasonable ground upon which the legislation could be rested, unless the simple decision of the Legislature should be held to constitute such reason."

We have, then, in *Wis., M. & P. R. Co. v. Jacobson*, the court's own construction of its decision in *Railway Company v. Smith* (the Michigan Case).

In *Beardsley v. N. Y., L. E. & W. R. Co.*, supra, holding a New York statute, similar to the Michigan and the Virginia mileage statutes, in conflict with the fourteenth amendment of the Constitution of the United States, the opinion, while indicating that the court was not disposed to agree with all of its reasoning, says: "The Supreme Court of the United States, in *Railway Company v. Smith*, has practically foreclosed all discussion on the question of the constitutionality of statutes of the character of the one before us."

We fully recognize, as did the court in *Beardsley v. N. Y.*, etc., Co., supra, that the decision in the Michigan Case is conclusive upon us on the question of the constitutionality of the statute under consideration, and therefore the judgment of the State Corporation Commission complained of must be affirmed.

CAMDEN INTERSTATE RY. CO. *v.* BROOM.

(Circuit Court of Appeals, Sixth Circuit, July 21, 1905.)

[139 Fed. Rep. 595.]

Street Railroads—Injury of Child at Crossing—Negligence of Motorman.*—A. motorman operating a street car on approaching a crossing where a number of children are congregated or passing across the tracks is bound to know that they may not exercise the care of older persons, and to take special precautions accordingly to avoid their injury; and where in such case a child was run over and injured, and there was evidence of a substantial character tending to show that the car approached the crossing at a speed of 10 or 15 miles an hour, without giving any warning of its approach, although such evidence was contradicted, a verdict finding that the company was chargeable with negligence will not be disturbed.

In Error to the Circuit Court of the United States for the Southern District of Ohio.

A. R. Johnson, for plaintiff in error.

R. B. Miller and *W. D. James*, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. On December 5, 1902, the plaintiff below, Edward Broom, a boy six years old, was run over by one of the defendant company's cars, and lost a leg. The accident occurred in the morning, at or near a street crossing

*For the authorities in this series on the question of the care required of those in charge of street cars to avoid injuring children in streets, see extensive note, 1 R. R. R. 386, 24 Am. & Eng. R. Cas., N. S., 386; foot-note appended to *Rohloff v. Fair Haven & W. R. Co.* (Conn.), 15 R. R. R. 154, 38 Am. & Eng. R. Cas., N. S., 154; foot-note appended to *Indianapolis St. Ry. Co. v. Schomberg* (Ind.), 14 R. R. R. 627, 37 Am. & Eng. R. Cas., N. S., 627; *Cameron v. Duluth-Superior Traction Co.* (Minn.), 14 R. R. R. 632, 37 Am. & Eng. R. Cas., N. S., 632 (negligence on part of motorman in failing to anticipate danger of child approaching street car track); *Di Prisco v. Wilmington City Ry. Co.* (Del.), 11 R. R. R. 478, 34 Am. & Eng. R. Cas., N. S., 478 (liability for collision with child as affected by failure to provide conductor); *Forrestal v. Milwaukee Elec. Ry. & L. Co.* (Wis.), 11 R. R. R. 814, 34 Am. & Eng. R. Cas., N. S., 814 (duty of motorman upon seeing children near track at crossing); *Jett v. Central Elec. Ry. Co.* (Mo.), 11 R. R. R. 227, 34 Am. & Eng. R. Cas., N. S., 227 (motorman's knowledge of danger of child on track was for jury; and his right to presume that they would avoid danger); *Gorman v. Louisville Ry. Co.* (Ky.), 6 R. R. R. 803, 29 Am. & Eng. R. Cas., N. S., 803; *Koenig v. Union Depot R. Co.* (Mo.), 7 R. R. R. 655, 30 Am. & Eng. R. Cas., N. S., 655 (question for jury as to negligence of motorman where child was injured on track); *Hoon v. Beaver Valley Traction Co.* (Pa.), 7 R. R. R. 556, 30 Am. & Eng. R. Cas., N. S., 556 (sufficiency of evidence of negligence where child six years old was killed at crossing); *Sample v. Consolidated Light & Ry. Co.* (W. Va.), 1 R. R. R. 380, 24 Am. & Eng. R. Cas., N. S., 380 (care required of motorman in looking out for children); *Jones v. United Traction Co.* (Pa.), 1 R. R. R. 395, 24 Am. & Eng. R. Cas., N. S., 395 (negligence in running over child on street railway track); *Nolder v. McKeesport, W. & D. Ry. Co.* (Pa.),

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in Ironton, Ohio, while the boy, in company with other children, was on his way to school. He brought this suit by his next friend, claiming the company was liable, because the brakes on the car were out of order (one set being off and the other not working properly), so it could not be stopped quick enough to avoid striking him, and because, in view of the presence of the children at and near the crossing, the motorman did not use the necessary precautions in approaching it, running at too high a rate of speed, without keeping a proper lookout and giving warning by bell or gong of his approach. The company defended on the ground that the car was properly equipped with brakes, and that the accident was inevitable, not being attributable either to the condition of the car or the action of the motorman in operating it, but solely to the conduct of the boy in suddenly and unexpectedly running from the sidewalk in front of or against the car. A motion for peremptory instructions in favor of the defendant having been denied, there was a verdict and judgment for \$10,000, which the court declined to disturb.

It is very earnestly argued that no case for recovery was shown in the testimony, and that, if there was, the court erred in its rulings during the trial. The accident took place on Elm street, at or near the east side of its intersection with Third street, at about half past 8 o'clock in the morning, when the children of the neighborhood were on their way to the public school, located on the east side of Third street, about half a block north of Elm. The street railway of the defendant company runs south on Second street to Elm, then east on Elm to a point between Fourth and Fifth, where it crosses a bridge over

1 R. R. R. 396, 24 Am. & Eng. R. Cas., N. S., 396 (question for jury whether injuries to child struck by street car was caused by negligence); *Citizens St. R. Co. v. Hamer* (Ind.), 2 R. R. R. 9, 25 Am. & Eng. R. Cas., N. S., 9 (right of motorman to assume that child seven years old will exercise care); *Welsh v. United Traction Co.* (Pa.), 2 R. R. R. 595, 25 Am. & Eng. R. Cas., N. S., 595 (sufficiency of evidence of street railway company's negligence, in action for running over a child); *Gray v. St. Paul City Ry. Co.* (Minn.), 5 R. R. R. 698, 28 Am. & Eng. R. Cas., N. S., 698 (duty of motorman to look out for children); *Chicago City Ry. Co. v. Tuohy* (Ill.), 4 R. R. R. 1, 27 Am. & Eng. R. Cas., N. S., 1 (negligence question for jury where boy was injured on track); *Pinder v. Brooklyn Heights R. Co.* (N. Y.), 7 R. R. R. 743, 30 Am. & Eng. R. Cas., N. S., 743 (liability for death of boy struck by a car after being kicked from another car by its motorman); *Ackerman v. Union Traction Co.* (Pa.), 8 R. R. R. 485, 31 Am. & Eng. R. Cas., N. S., 485 (sufficiency of evidence of negligence where boy on steps of freight car was killed by street car); *Consolidated & C. P. Ry. Co. v. Wyatt* (Kan.), 9 Am. & Eng. R. Cas., N. S., 756 (accident at street railway crossing); *Levin v. Second Ave. Traction Co.* (Pa.), 23 Am. & Eng. R. Cas., N. S., 318 (care due children of tender years); *Fleishman v. Never-sink Mountain R. Co.* (Pa.), 4 Am. & Eng. R. Cas., N. S., 261 (electric railway company was not liable for injury to child); *Callery v. Easton Transit Co.* (Pa.), 11 Am. & Eng. R. Cas., N. S., 323; *Culbertson v. Crescent City R. Co.* (La.), 6 Am. & Eng. R. Cas., N. S., 522 (liability where child suddenly runs on track and is killed); *Perry v.*

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Storms creek. The car which caused the injury was an inter-urban one, 38 feet long, and weighing 20 tons. It was in charge of Motorman Willis, who had been operating cars over the route for about four months, knew the location of the school-house, that the school was in session, and was familiar with the habits of the children in going to and coming from school. On this day the car stopped after it had rounded the curve from Second into Elm, to take on a passenger, and then started out Elm towards the crossing on the east side of Third, about 300 feet distant, and in plain view. At this time a number of school children were collected at the intersection of Third and Elm on or near the southeast corner. There was a fire hydrant on this corner, and near it a pool of muddy water. The sidewalk was not paved, nor was the crossing over Elm. The situation at that corner was thus described by one of the defendant's witnesses:

"I was standing at the water plug that is right at the corner there, and the children were all gathered around there, getting ready to go to school. The first bell was ringing for school. The boys were splashing water on the girls—the little girls—as they came along, and I saw the car coming."

The little Broom boy was at or near this corner as the car came east on Elm. He was on his way to school. To get there he had to cross Elm, which was about 30 feet wide; so it was only about 12 feet from the outer edge of the sidewalk (there was no curb there) to the nearest rail.

All of the above facts are practically undisputed. As to what occurred at the precise time of the accident there is a conflict in the testimony. The testimony of the defendant tended to

Macon Consol. St. Ry. Co. (Ga.), 10 Am. & Eng. R. Cas., N. S., 819 (accident caused by obstruction near track and failure to signal); Fox v. Oakland Consol. St. Ry. (Cal.), 9 Am. & Eng. R. Cas., N. S., 825 (negligence after discovery of child's peril); Kierzenkowski v. Philadelphia Traction Co. (Pa.), 9 Am. & Eng. R. Cas., N. S., 533 (child suddenly appearing upon track); Slensby v. Milwaukee St. Ry. Co. (Wis.), 9 Am. & Eng. R. Cas., N. S., 527 (failure of motorman to exercise ordinary care after seeing child upon track); San Antonio St. R. Co. v. Mechler (Tex.), 1 Am. & Eng. R. Cas., N. S., 265; Mitchell v. Tacoma R. & M. Co. (Wash.), 1 Am. & Eng. R. Cas., N. S., 269; Czezewzka v. Benton-Bellefontaine R. Co. (Mo.), 1 Am. & Eng. R. Cas., N. S., 258; Riley v. Salt Lake R. T. Co. (Utah), 1 Am. & Eng. R. Cas., N. S., 258; Wallace v. City & Suburban R. Co. (Ore.), 1 Am. & Eng. R. Cas., N. S., 258; Sciortino v. Crescent City R. Co. (La.), 6 Am. & Eng. R. Cas., N. S., 526; Bergen County Traction Co. v. Heitman (N. J.), 11 Am. & Eng. R. Cas., N. S., 286 (duty of motorman to exercise watchfulness); Gannon v. New Orleans City, etc., R. Co. (La.), 6 Am. & Eng. R. Cas., N. S., 792 (negligence of driver of street car and defective brake); Henderson v. Detroit Citizens' St. Ry. Co. (Mich.), 10 Am. & Eng. R. Cas., N. S., 812 (injury to boy while crossing in front of moving street car); Heinze v. Metropolitan St. Ry. Co. (Mo.), 13 R. R. R. 107, 36 Am. & Eng. R. Cas., N. S., 107 (negligence of motorman was a question for jury where child was injured on street crossing); Gray v. St. Paul City Ry. Co. (Minn.), 5 R. R. R. 698, 28 Am. & Eng. R. Cas., N. S., 698 (duty of motorman to look out for children at crossing).

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show that the car was coming out Elm street at its usual rate of speed (the motorman said five or six miles an hour); that the brakes were in perfect condition; that the motorman was keeping a proper lookout; that no one was on or near the track as the car neared the crossing on the east side of Third street, when suddenly and unexpectedly the little Broom boy started from the sidewalk on the south side of Elm near the corner, and, running rapidly and in a diagonal direction across Elm street, with his face away from the approaching car, ran either directly in front or against the side of the car so quickly that it was impossible for the motorman to stop the car in time to prevent the accident. As soon as the motorman saw the boy, he applied the brakes and stopped the car, but meanwhile it had run over the boy, who was picked up under the rear platform. If this were all the testimony in the case, it might well be said that no ground of recovery was shown (*Chilton v. Central Traction Co.*, 152 Pa. 425, 25 Atl. 606; *Fleishman v. Neversink Mt. Ry. Co.*, 174 Pa. 510, 34 Atl. 119; *Booth on Street Railways*, § 310); but the testimony of the plaintiff (and it was of a substantial character) tended to prove that although, from the number of children on or near the Third street crossing in plain view of the motorman as he started out Elm, he should have anticipated some one of them might attempt to cross the track in front of his car, and therefore was bound to take precautions to avoid injuring him, holding the car under control, keeping a keen lookout, not only ahead, but on both sides, and sounding a warning of his approach, nevertheless the car was run out Elm at a speed of from 10 to 15 miles an hour, and took the crossing without slackening its speed or giving any warning whatever of its approach; that as the car approached Third, the witness, Calvin Frowine, a school boy about 14 years old, was crossing Elm on a diagonal course, starting from the southwest corner of third and Elm. He was on the crossing and close to the track when, happening to see the car coming, he stepped back from the track, and it went on. Meantime the little Broom boy, who was on the southeast corner, started to cross Elm street, passing to the left of the mudhole, and then running diagonally toward the track.. He passed the Frowine boy about two feet to his right, with his face turned away from the approaching car, and, stepping upon the track in front of it, was struck and run over. If the jury believed this testimony; if it reached the conclusion that, had the motorman taken proper precautions, he would have had the car under control, and warned the child, and avoided the accident—it was justified in finding for the plaintiff. The duty of a motorman approaching a crossing is well established. He may not rely upon an exclusive right to use the street. Those on foot have rights too. He is bound to keep a vigilant lookout, give warning of his approach, and so regulate the speed of his car as to avoid injuring those using

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the crossing. *Cinti. St. Ry. Co. v. Snell*, 54 Ohio St. 197, 43 N. E. 207, 32 L. R. A. 276. As at crossings, so in the case of children, special precautions are demanded. "Children, wherever they go, must be expected to act upon childish instincts and impulses; and others, who are chargeable with the duty of care and caution towards them, must calculate upon this, and take precautions accordingly." *Union Pac. Ry. Co. v. McDonald*, 152 U. S. 262, 277, 14 Sup. Ct. 619, 625, 38 L. Ed. 434, quoting Judge Cooley in *Powers v. Harlow*, 53 Mich. 507, 514, 19 N. W. 257, 51 Am. Rep. 154. To a certain extent the care which is not required of children incapable of contributory negligence must be exercised towards them by those operating dangerous machines.

In thus stating the tendency of plaintiff's testimony, we have taken the view favorable to his side. We are bound to do this. The jury had a right to take this view, and we have no power to set the verdict aside because we may entertain a different one. This was not the case of an absence, but of a conflict, of testimony. Upon nearly every point of importance there were witnesses on one side and the other. The case was therefore clearly one for the jury. Although we may disagree with its conclusions, and regard its assessment as excessive, we cannot, on that account, reverse the judgment based upon its verdict. As we said recently in the case of *Minahan v. Grand Trunk Ry.* (C. C. A., decided June 6, 1905) 138 Fed. 37, in which we attempted to mark out the respective provinces of the court and jury in these cases:

"The court cannot balance the evidence when it is conflicting, and then compel the jury to find a verdict according to the court's estimate of the relative weight of the evidence for the respective parties. Such a doctrine would efface the line of demarcation between the provinces of the court and jury."

2. We have not discussed the question of the condition of the brakes, as shown by the testimony, because upon the trial this point apparently dropped out of sight; but it is now submitted there was error in the charge upon the subject; that the court told the jury that, if there was "any evidence tending to show that the failure to stop the car was due to the inefficient brakes, or the absence of brakes, then that would be ground for recovery." It is insisted this was going too far; that it is not sufficient if there be evidence merely "tending to show"; there must be evidence showing the thing to the satisfaction of the jury. This is quite true, but the court, both before and after using the language objected to, said as much to the jury. The jury was not, in our opinion, misled.

3. It is further submitted that the court erred in its charge in assuming that the accident took place at a street crossing. The petition alleged that the injury took place at a street crossing. The answer denied generally. The testimony was conflicting. The court gave the jury the law with respect to street

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crossings. Undoubtedly the accident took place at or near a street crossing. In presenting the claim of the plaintiff, the court apparently assumed that the accident took place at a crossing, but the court qualified this assumption by saying:

"I am not undertaking to say what the evidence is. I am stating to you the plaintiff's claim, and it is for you to determine from the evidence what the situation presented to the motor-man was."

But, if the charge contained an assumption that the accident took place at a crossing, so as to mislead the jury and prejudice the defendant, the attention of the court should have been called to the matter at the time so that it might have been corrected.

4. The defendant presented 19 special charges, which were refused on the ground that most of them were covered by the charge given, and the rest inapplicable. We have gone over them carefully, and are unable to see how the defendant was prejudiced by their rejection. The charge as given covered the case and presented the issues, with the law, fairly to the jury. The claim of the defendant is thus described:

"If he was exercising due prudence and care—ordinary prudence and care, all that the situation required of him—and the boy unexpectedly ran in front of the car, then the company would not be liable, for that would not be the fault of the motor-man. That might happen. A car might be moving at a slow rate of speed absolutely within the control of the motorman, due warning might be given, all reasonable precautions might be taken to avoid injuring people who might be using the crossing, and a thoughtless boy suddenly get upon the track in front of the car, when it would be impossible to stop it in time to save him, and be injured; but in such a case the motorman would not be negligent, and the company would not be responsible for the injury."

A number of these requests are based upon the theory that if the boy suddenly and unexpectedly ran from the sidewalk into Elm street against the car or in front of it, and so was injured, then the verdict must be for the defendant. This is to disregard wholly the duty of the motorman. In the case of small children at or near a crossing, a motorman may anticipate that a boy six years old is liable to run out into the street against or in front of the car. He is bound to be on the lookout for that sort of thing, and take proper precautions to guard against an accident resulting from it.

These, we think, are the only points that require discussion. There was no prejudicial error in the rulings respecting the admission or rejection of testimony.

The judgment is affirmed.

NORRIS *v.* NEW YORK, N. H. & H. R. Co.

(Supreme Court of Errors of Connecticut, Nov. 7, 1905.)

[61 Atl. Rep. 1075.]

Railroads — Accidents at Crossings — Negligence.* — A railroad, which, in order to run a train of empty passenger cars a distance of 20 miles in about 2 hours, ran it over a crossing at a speed of 40 miles an hour without whistling the required crossing signal or ringing the bell, and at an hour on a Sunday when the passing of a passenger train at the place in question was unusual and unprecedented, was negligent.

Same—Contributory Negligence—Burden of Proof—Effect of Default.—A default by a railroad, in an action against it for the negligent killing of plaintiff's intestate, operates as a prima facie admission by the railroad of the truth of allegations of the complaint that plaintiff's intestate was in the exercise of due care, and throws on the railroad the burden of disproving such allegations.

Same—Contributory Negligence.†—A traveler who approaches and attempts to cross the tracks of a railroad at a crossing is required to act with reasonable prudence, in view of all the circumstances.

Same—Evidence—Sufficiency.—On a hearing in damages, after default, in an action against a railroad for the killing of plaintiff's intestate at a crossing, evidence held insufficient to sustain the burden, cast on defendant by the default, of showing that plaintiff's intestate was guilty of contributory negligence.

Appeal from Superior Court, Litchfield County; William S. Case, Judge.

Action by Bertha C. Norris, administratrix of Austin H. Norris, deceased, against the New York, New Haven & Hartford Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Donald T. Warner and Howard F. Landon, for appellant.

Caleb A. Morse, for appellee.

*For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to rate of speed of trains approaching crossings, see foot-note appended to *Golinvaux v. Burlington, C. R. & N. R. Co.* (Iowa), 14 R. R. R. 185, 37 Am. & Eng. R. Cas., N. S., 185.

For the authorities in this series on the question whether it is negligence per se to fail to give crossing signals, see foot-notes appended to *McDonald v. New York Cent. & H. R. R. Co.* (Mass.), 14 R. R. R. 125, 37 Am. & Eng. R. Cas., N. S., 125; foot-note appended to *Sights v. Louisville & N. R. Co.* (Ky.), 10 R. R. R. 60, 33 Am. & Eng. R. Cas., N. S., 60; *Mercer v. Southern Ry.* (S. Car.), 8 R. R. R. 703, 31 Am. & Eng. R. Cas., N. S., 703.

†For the authorities in this on the question of care required of a highway traveler before attempting to cross railroad track, see *Wilson's Adm'rs v. Chesapeake & O. Ry. Co.* (Ky.), 16 R. R. R. 103, 39 Am. & Eng. R. Cas., N. S., 103; foot-note appended to *Ihrig v. Erie R. Co.* (Pa.), 15 R. R. R. 159, 38 Am. & Eng. R. Cas., N. S., 159; foot-notes appended to *St. Louis, I. M. & S. Ry. Co. v. Johnson* (Ark.), 16 R. R. R. 775, 39 Am. & Eng. R. Cas., N. S., 775; foot-notes appended to *Louisville & N. R. Co. v. Bryant* (Ala.), 14 R. R. R. 734, 37 Am. & Eng. R. Cas., N. S., 734.

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HALL, J. The facts found by the trial court, material to the questions raised by this appeal, are these: Between 1 and 2 o'clock in the afternoon of Sunday, January 21, 1903, the plaintiff's intestate, Austin H. Norris, was struck and killed at a highway grade crossing about 300 feet north of the Burrville Station, on the Naugatuck Division of the defendant's railroad, by the locomotive of a north-bound train. Mr. Norris, who was a clergyman, was on his way to conduct a religious service at Burrville, a village midway between Torrington and Winsted, the latter being the northern terminus of the Naugatuck Division, and was driving from the east, at the rate of 6 or 7 miles an hour, in a top buggy, the side curtains of which were down, along a highway which intersects the railroad tracks at the crossing at nearly right angles. He had lived in that immediate neighborhood for ten years, had traveled on Sunday during that time, had for two years immediately preceding the accident crossed the railroad at this point at this hour for the same purpose nearly every Sunday, and was thoroughly familiar with the conditions existing at the crossing. He was seen just before the accident within 200 feet of the crossing by persons some distance from him, but was not observed to look either to the north or south as he approached the crossing, and he at no time checked the speed of his horse. There are places on said highway, from a point 200 feet from the crossing up to within 20 feet of it, where the railroad tracks on the south may be seen; but these points occur only at intervals, and it did not appear that, when Mr. Norris was at any of them, the position of the train was such that he could have seen it. From the crossing to a point 20 feet east of it there was an unobstructed view from the highway of the tracks for several hundred feet. The train by which Mr. Norris was killed was a special passenger train, which left Ansonia at about noon, to enable people from Ansonia and Waterbury to attend a funeral at half past 1 of that day at Torrington. The regular Sunday train over the Naugatuck Division at this time left Ansonia, going north, at about 9 o'clock in the morning, and reached there upon its return at about 6 o'clock in the afternoon. No passenger train had ever been known to run on Sunday at the time and place where the accident occurred. Having discharged its passengers at Torrington on its northward trip, at about 10 minutes past one, the train continued north from that point with only its crew, consisting of a conductor, engineer, pilot engineer, fireman, and one brakeman, for the purpose of reaching a turntable at Winsted, which is about 10 miles north of Torrington, in order to turn the locomotive and come back to Torrington, so as to leave that place on the return trip south shortly before 3 o'clock in the afternoon. The engineer in charge of the train, though an engineer of experience on the south part of this division of the road, had never run an engine north of Waterbury, and as there was no available engineer to act as pilot engineer north of Waterbury, the foreman of motive power,

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who had run engines at various times before, but had never had a regular run, acted in that capacity. The duty of a pilot engineer, under the rules of the defendant company, was to control the speed of the engine, give the signals at stations and crossings, and generally to be responsible for the management of the engine, so far as the track is concerned. As the train approached Burrville, the whistle was blown once for the station before reaching the whistling post. The crossing signal of two long and two short blasts was not given, nor was the whistle blown after said station signal was sounded, nor was the bell rung. The rate of speed of the train at the crossing was about 40 miles an hour. Upon these facts the court found that the defendant was guilty of negligence, to which the death of Mr. Norris was due, and Mr. Norris was free from contributory negligence. Among the reasons of appeal, the defendant claims that the trial court erred (1) in not rendering judgment for nominal damages only upon the facts found, and (2) in not holding that the failure of the plaintiff's decedent to look to see if a train was approaching, or to slacken the speed of his horse, or to take any precautions to ascertain if a train was approaching, before attempting himself to cross the railroad tracks, constituted as a matter of law contributory negligence.

With the facts before us that the defendant, in order to run a train of empty passenger cars a distance of 20 miles in about two hours, ran it over the crossing in question at a speed of 40 miles an hour, without whistling the required crossing signal or ringing the bell, and at an hour on Sunday when the passing of a passenger train at that place was unheard of, no argument is needed to show that the trial court committed no error in holding that the defendant failed upon the hearing in damages to prove that its employees who managed this train were free from negligence. Upon the question of contributory negligence, the only ruling made by the trial court was in finding, upon the foregoing facts, that the plaintiff's decedent was free from such negligence, and in rendering judgment for substantial damages. Neither such finding nor such judgment involves a ruling that the exercise of due care by Mr. Norris did not require him to look for an approaching train, or to take any precautions to ascertain whether a train was approaching, before attempting himself to cross the railroad tracks. The trial court was not called upon to decide whether the fact that it was Sunday, and that Mr. Norris knew that no train had ever passed that place near that hour on that day, relieved him as a matter of law from looking to see if a train was coming, or from taking any precautions to avoid being injured by a train that might be approaching, since it was not proved that the deceased did not look to see if a train was approaching, nor that he did not take any precautions to avoid a possible injury.

It is to be remembered that this case was heard in damages after a default, one of the consequences of which was a prima

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facie admission by the defendant of the truth of allegation of the complaint that the deceased was in the exercise of due care at the time of the accident, and the assumption by the defendant of the burden of disproving such allegation. The test, therefore, of the sufficiency of the facts found to support the judgment rendered, is not whether they justify the conclusion that plaintiff's decedent was free from negligence, but whether they prove that he was not. Although the fact that he was not observed to look either way by persons who saw him from the distance may have been proper evidence that he did not look, it was not proof that he did not. It is entirely consistent with all the facts found that the deceased looked as he passed the places where the track could be seen, between the points 200 feet and 20 feet from the crossing, but failed to see the approaching train, because it was not then within the range of his vision, and that he looked and saw the approaching train when he was within 20 feet of the crossing, but was then either unable to stop his horse, or had good reason to think that it would be dangerous to do so, and that he might reasonably have believed under the circumstances that he could cross the track before the train would reach the crossing. In approaching and attempting to cross the tracks he was required to act with reasonable prudence, in view of all the circumstances. *Lawler, Adm'r, v. Hartford St. Ry. Co.*, 72 Conn. 74-82, 43 Atl. 545. The question decided by the trial court upon this branch of the case was whether the facts established proved that he did not so act. In holding that they did not, and in rendering judgment for substantial damages, the superior court committed no error of law.

There was no error in refusing to find the facts as requested in the defendant's draft finding.

No error.

BAMBERG et al. v. ATLANTIC COAST LINE R. Co.

(Supreme Court of South Carolina, Oct. 7, 1905.)

[51 S. E. Rep. 988.]

Railroads—Accident at Crossing—Pleading.*—In an action for injuries received at a railway crossing, plaintiff need not allege that he did not hear or see the approaching train.

Same—Question for Jury.†—Ordinarily it is for the jury to say whether an attempt to cross a railroad track without stopping to look and listen is negligence.

*For the authorities in this series on the question whether plaintiff must plead freedom from contributory negligence, see foot-notes appended to *Orient Ins. Co. v. Northern Pac. Ry. Co.* (Mont.), 16 R. R. R. 207, 39 Am. & Eng. R. Cas., N. S., 207.

†For the authorities in this series on the question whether it is contributory negligence to fail to stop, look, and listen before attempting to cross railroad tracks, see foot-notes appended to *St.*

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Same.—Where there is evidence tending to show that signals were not given at a railroad crossing by a train passing over an interlocking switch, though according to the rules of the company it would not be opened except for such signals, the court will not hold as matter of law that signals were given.

Trial—Failure to Instruct.—A failure to charge that signaling statutes had no application to plaintiff because he was not injured at a traveled place is not error, where no such request was made.

Railroads—Signals at Crossing.†—Where a prudent railroad company would give warning of an approach of a train to a public place, it is negligence to fail to do so.

Appeal from Common Pleas Circuit Court of Barnwell County; Klugh, Judge.

Action by Mary A. Bamberg and her husband, C. T. Bamberg, against the Atlantic Coast Line Railroad Company. From judgment for plaintiffs, defendant appeals. Affirmed.

J. T. Barron and Robt. Aldrich, for appellant.

Bates & Simms, for respondents.

WOODS, J. The plaintiff, in going from her home in the town of Denmark to the defendant's passenger station, undertook to cross the railroad track at a point very near the station, and was struck by the locomotive of the train she intended to take as a passenger. For the injuries resulting she recovered judgment.

1. The first exception charges error in the refusal of the circuit court to sustain the demurrer interposed, on the ground that the complaint failed to state facts sufficient to constitute a cause of action, because, as defendant insists, "the facts as stated in the complaint show that the plaintiff's injuries were due to her own negligence in attempting to cross the railroad track in front of a moving train, and in such close proximity thereto as to render it impossible for her to do so without being struck by the engine." It is alleged in the second paragraph of the complaint that the plaintiff, intending to become a passenger, was approaching the station from her home in "the only way provided by said railroad for passengers in her neighborhood to reach the said depot, and which way was that

Louis, etc., Ry. Co. v. Johnson (Ark.), 16 R. R. R. 775, 39 Am. & Eng. R. Cas., N. S., 775; Wilson's Adm'rs v. Chesapeake & O. Ry. Co. (Ky.), 16 R. R. R. 103, 39 Am. & Eng. R. Cas., N. S., 103; Ihrig v. Erie R. Co. (Pa.), 15 R. R. R. 159, 38 Am. & Eng. R. Cas., N. S., 159; foot-notes appended to Louisville & N. R. Co. v. Bryant (Ala.), 14 R. R. R. 734, 37 Am. & Eng. R. Cas., N. S., 734.

†As to whether it is negligence per se to fail to give crossing signals, see foot-notes appended to McDonald v. New York Cent. & H. R. R. Co. (Mass.), 14 R. R. R. 125, 37 Am. & Eng. R. Cas., N. S., 125; Mercer v. Southern Ry. (S. Car.), 8 R. R. R. 703, 31 Am. & Eng. R. Cas., N. S., 703; foot-note appended to Sights v. Louisville & N. R. Co. (Ky.), 10 R. R. R. 60, 33 Am. & Eng. R. Cas., N. S., 60.

For the authorities in this series on the question whether statutory requirements are the sole measure of a railroad company's duties with respect to giving crossing signals, see foot-note appended to Louisville & N. R. Co. v. Sawyer (Tenn.), 16 R. R. R. 800, 39 Am. & Eng. R. Cas., N. S., 800.

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adopted by the public by the consent or acquiescence of the defendant for passengers in approaching defendant's depot from said neighborhood." In the third paragraph the complaint continues: "That after walking a short while said plaintiff reached the point where the defendant's side track, commonly known as the 'House Track,' ran into the main track, and the plaintiff, as usual with passengers, undertook to cross the main track from the thoroughfare and traveled place upon which she had been walking as aforesaid, in order to reach the other thoroughfare and traveled place between the main track and said 'House Track,' and the only way provided by the said defendant for passengers as aforesaid to reach the depot, when to plaintiff's surprise and horror, and without warning on the part of the defendant, and without the ringing of the bell or the blowing of the whistle, the locomotive of defendant's said passenger train, under the control of defendant's agents and servants, willfully, negligently, recklessly, and wantonly struck her," etc. The distinct point made by defendant is that, while negligence is alleged against those in charge of the train, there is no allegation that the plaintiff did not see or hear the train, and, being in the possession of her senses, it must be presumed as a matter of law the plaintiff did hear and see it, and will be held guilty of contributory negligence in attempting to cross the track in front of it. This position is untenable. If the courts could presume that one about to cross a railroad track would always be aware by sight or hearing of the approach of a train without the blowing of a whistle or the ringing of a bell, it would be quite unnecessary to require these signals. The plaintiff having set out negligent acts of the defendant, which she alleged caused the injury, it was not necessary for her to anticipate the affirmative defense of contributory negligence by denying that she heard or saw the approaching train. *Donahue v. Railroad Co.*, 32 S. C. 299, 11 S. E. 95, 17 Am. St. Rep. 854.

2. The defendant next insists the motion for nonsuit should have been granted, because contributory negligence was conclusively shown by the failure of the plaintiff to look and listen before attempting to cross the track. No doubt the failure to look and listen immediately before going on a railroad track, under some circumstances, would be held to admit of no other inference than that the person injured was guilty of contributory negligence, and in such cases the court would grant a nonsuit on the principle announced in *Jarrell v. Railway Co.*, 58 S. C. 491, 36 S. E. 910. But support is not to be found in principle or authority for the proposition that it is contributory negligence, under all circumstances, not to look and listen before attempting to cross a railroad track. The view taken in this state is that it is ordinarily for the jury to say whether the attempt without taking these precautions was negligence. *Zeigler v. Railroad Co.*, 5 S. C. 221; *Edwards v. Railway Co.*, 63 S. C. 271, 41 S. E. 458. The true principle to be deduced from

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the authorities is well expressed in the following extract from 7 A. & E. Ency. Law (2d Ed.) 433, note: "There is no doubt that, where it appears beyond controversy that a failure to stop, look, and listen was a proximate cause of an injury, the courts will hold such failure contributory negligence as a matter of law. Schofield v. Chicago, etc., R. Co., 114 U. S. 615, 5 Sup. Ct. 1125, 29 L. Ed. 224; Hixson v. St. Louis, etc., R. Co., 80 Mo. 335. But this is a very different matter from holding a failure to stop, look, or listen negligence per se, sufficient to bar a recovery. In the one line of cases it is properly held that a failure to stop, look, or listen was negligence, as a matter of law, upon the disputed facts, because ordinary care required the precaution, and the failure to take it was a proximate cause of the injury that followed. In other words, there is a difference between negligence per se, without regard to the surrounding circumstances, and negligence as a matter of law, in view of all the circumstances. And it will be noticed that in most, if not all, the cases, including those in Pennsylvania, where the doctrine that it is negligence per se not to stop, look, and listen is enunciated, the facts were such that the court would have been justified that there had been contributory negligence as matter of law, because the failure to stop, look, or listen had been a proximate cause of the injury, which would have been avoided by ordinary care." Under this statement of the law, the circumstances here do not warrant the court in saying that the failure of the plaintiff to look and listen immediately before going on the track conclusively proved negligence on her part contributing to her injury as a proximate cause. Intending to become a passenger, she was using a way of approach to the defendant's station much used by the public. And in addition there was sufficient testimony to go to the jury as to whether the defendant so acquiesced in the use of this way as to invite its use by the public as an approach to the railway station, and so charge the railroad company with the care due to those who enter under its invitation, under the principles stated in Jones v. Railway Co., 61 S. C. 560, 39 S. E. 758; Matthews v. Railway Co., 67 S. C. 499, 46 S. E. 335, 65 L. R. A. 286. The plaintiff testified she had already crossed the track 30 or 40 yards from the place where she was injured; had there looked for the train, but did not see it; walked rapidly on, and, hearing no whistle or bell, undertook to cross the second time without looking again. Under this proof it was for the jury to say whether the plaintiff's failure to look and listen constituted contributory negligence.

3. The defendant insists, however, that the only charge of negligence on the part of the defendant was the failure to give signals of the approach of the train, and the court must hold, as a matter of law, that the signals were given, because according to the rules of the railroad the interlocking switch which the train had to pass was not to be opened, except upon

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the signal of four blasts of the whistle. This device and regulation of the railroad company may make it extremely probable that the whistle was sounded, yet it is possible that on this occasion the operator of the interlocking switch opened it without the signals. There was some direct testimony to the effect that the signals were not given, and it would therefore have been error to have taken the question from the jury.

4. There was no request made to the circuit judge to charge there was no evidence that the plaintiff was injured at the crossing of a highway, street, or traveled place; and hence sections 2132 and 2139 of the Civil Code had no application. The failure, therefore, to pass on that question cannot now be imputed as reversible error.

5. After telling the jury, in effect, if the injury was not received at a crossing, the statute had no application to the case, the circuit judge said: "If a prudent railroad company, in approaching by its train a place like that, would give warning of the approach of its train, not because the statute requires it to do it, but simply as an act of ordinary prudence and care, so as to warn people of the approach of its train in order that they may get out of the way of the danger, then, if any railroad company fails to do that which a railroad company of ordinary prudence would do, that is negligence—not negligence per se, under the statute, but negligence simply because of the failure to exercise the care which an ordinarily prudent railroad would exercise." The complaint having stated a cause of action at common law for negligence resulting in injury, in the foregoing charge the circuit judge clearly stated the degree of care required of the defendant at common law, regardless of the statute.

The judgment of this court is that the judgment of the circuit court be affirmed.

DEWEZ v. ORLEANS R. Co.

(Supreme Court of Louisiana, Dec. 7, 1902. On Rehearing, May 22, 1905.)

[39 So. Rep. 433.]

Appeal—Bond—Time of Filing.—The petition for the appeal, properly praying for citation, and the order thereon, were filed within the 12 months following the date of the judgment. The order of appeal was granted, and the bond filed within the year. This suffices. *Boutte v. Boutte's Ex'rs*, 30 La. Ann. 181.

Same—Citation—Service.—It is not necessary that the citation of appeal be served within the year. If the appeal be taken and bond given within the year, although the citation be served after it has elapsed, but in time for the term of court, it will be sufficient. *Barremore's Syndic v. Bradford's Heirs*, 10 La. 150.

Same—Preparation of Papers.—If the reasons of the clerk be taken into consideration for not having prepared the papers within the year, they are not sustained by authority as valid.

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Same—Delay—Injury to Appellee.—The appellee has not suffered by the delay. *Petit v. Drane*, 8 La. 218.

Same—Order of Appeal—Signing.—The record shows that the order of appeal must have been timely signed, although the fact does not appear on the face of the order. The merest oversight is not sufficient ground to dismiss, in view of the date of filing the order.

Street Railroads—Collision with Vehicle.*—Persons emerging from streets which are intersected by others, upon which electric cars are operated are bound, in common caution, to look and listen for the approach of such cars before attempting to drive across the tracks, and, though there may be a rule, imposed upon its employees by the railroad company, that its cars shall keep a certain distance apart, the precaution mentioned should nevertheless be observed, and the mere fact that a car has passed will not justify the driver of a vehicle in acting upon the assumption that no other is near, when the contrary would become known by the ordinary use of his eyes or ears.

Same—Evidence.—Where a milk cart and an electric car, moving upon lines which intersect each other almost at right angles, collide in such a way as to show that the points of contact were the right shaft of the cart and the left front umbrella post of the car, it cannot be said that the car ran into the cart, any more than that the cart ran into the car.

Nicholls, J., dissenting.

(Syllabus by the Court.)

Appeal from Civil District Court, Parish of Orleans; Thomas C. W. Ellis, Judge.

Action by Ernest Dewez against the Orleans Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed. Rehearing refused November 6, 1905.

Thomas M. Gill and *George W. Kendall*, for appellant.

Denegre, Blair & Denegre and *Victor Leovy*, for appellee.

On Motion to Dismiss the Appeal.

BREAUX, J. Defendants and appellees move to dismiss the appeal on the ground that they were not served with legal citation of appeal, nor with copy of order and petition of appeal, within the legal delays, owing to appellant's fault; and appellees moved to dismiss on the further ground that the transcript filed fails to show that the order of appeal was granted within the 12 months following the date of the judgment. The facts are, relating to the first ground to dismiss, as stated by the deputy clerk of the district court, if the clerk's affidavit can be considered at all, after the 12 months before mentioned, that the

*For the authorities in this series on the question whether a person must stop, look, and listen before attempting to cross street railway tracks, see foot-notes appended to *Los Angeles Traction Co. v. Conneally* (C. C. A.), 16 R. R. R. 107, 39 Am. & Eng. R. Cas., N. S., 107; *Vrooman v. North Jersey St. Ry. Co.* (N. J.), 15 R. R. R. 393, 38 Am. & Eng. R. Cas., N. S., 393, foot-notes appended to *Giardina v. St. Louis & M. R. Ry. Co.* (Mo.), 14 R. R. R. 579, 37 Am. & Eng. R. Cas., N. S., 579.

For the authorities in this series on the question of the care required of those driving other vehicles on streets upon which cars are operated, see foot-note appended to *Wood v. Boston Elevated Ry. Co.* (Mass.), 16 R. R. R. 475, 39 Am. & Eng. R. Cas., N. S., 475.

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delays in issuing the citation of appeal and accompanying papers were due to the appellant's neglect to pay particular costs, although called upon to pay.

It appears, by the affidavit only, that the appellant did not pay costs of the citation and copy of order of appeal before November 5, 1902, some time after the 12 months had elapsed.

These papers were then placed in the hands of the sheriff to be served.

With reference to the second ground of the motion to dismiss, the facts are that the order of appeal, though signed, is not dated; but it remains that the petition of appeal, on which the order of appeal was written, was filed within the 12 months, and the order also. The bond of appeal, also, was filed in due time.

Returning to the first ground of the motion to dismiss, we can only say that, whilst it is true that citation is the basis upon which rests the appeal, and that it should be served within the 12 months in order to enable an appellant to bring up his appeal, yet good reason may arise for not dismissing the appeal, even after the 12 months have elapsed.

We think that in this case it is not evident that the appellant is illegally responsible for the delay. We understand that at the end of the 12 months from date of judgment the clerk called on appellant for costs of making papers to be served (if we should consider at all the affidavit in question).

We are told by the appellees that these costs, the failure to pay which caused the delay, were trivial, and that it is impossible that they could not have been procured in time to have the service made. The amount of these particular costs and the ability to reasonably procure them are not grounds to dismiss the appeal, unless the clerk points out the law under which the demand was made and which justified him in postponing service of appeal as before mentioned.

The petition for the appeal prayed for service. It only remained for the clerk to issue the papers. The remedy did not consist in withholding the papers until the costs for preparing them had been paid.

Prior to filing the suit, the clerk has it in his power to require security, and as the suit progresses he may require his costs to be paid, and a contingency may arise when he would be justified in declining to perform services for a delinquent litigant in matter of costs. If such was the case here, it is not made evident in the record. We only have to deal with the naked fact that the clerk refused to perform particular service in matter of costs of suit before payment. To this we cannot give sanction. The service should have been made.

We do not consider the second ground before stated as fatal to the appeal.

The presumption is that the order of appeal was timely filed, and that when it was filed it had been signed.

The presumption becomes an absolute certainty when it is

considered in connection with the fact that the filing of the clerk shows that the petition of appeal and the order of appeal were filed in due time. The bond of appeal based upon this order also shows that the order must have been signed within the 12 months.

The motion to dismiss is therefore overruled.

Statement.

MONROE, J. This is an action for the recovery of damages for personal injuries sustained by the plaintiff and his wife, and for loss otherwise resulting from a collision between plaintiff's milk cart, driven by himself, and one of the defendant's cars. The answer is a general denial, and an averment that the injury and loss complained of, if any have been sustained, were caused by the negligence of the plaintiff. The facts, as we find them from the record, are as follows: Upon a cold, wet morning in January, 1899, the plaintiff, making his usual rounds, delivering milk to his customers from a two-wheeled cart, in which he was standing whilst his wife was seated, to his left, drove northward along Galvez street and attempted to cross the railroad track on Dumaine street, which street and track intersect Galvez street at a right angle. In making this attempt, and in view of the fact that he intended going westward, upon the north side of Dumaine street, his approach to the track was slightly obliqued in the direction mentioned, and he and his wife admit that neither of them, at any time, looked along Dumaine street to the eastward. They therefore failed to see the defendant's car, No. 25, which was approaching from that direction; and, as the motorman failed to see the cart in time to enable him to stop the car, the right shaft of the cart and the left front corner of the front platform of the car came into collision, with the result that the shaft was broken, the plaintiff's horse was thrown down, thereby breaking the other shaft, the plaintiff and his wife were thrown out and seriously injured, and the umbrella post, supporting the left front corner of the roof of the platform, as also the gate leading to the platform, of the car, were more or less bent and injured. The theory of the plaintiff is that as he approached Dumaine street he heard a bell announcing the approach of a car, and that, having stopped his cart in order to allow the car to pass, he assumed that no other was coming, and, without looking to verify his assumption, attempted to cross the track, immediately behind the passing car, when he was struck by a second car, of the approach of which no notice, by bell or otherwise, had been given. The theory of the defense is that the plaintiff drove briskly along Galvez into Dumaine street and did not stop or look until the collision occurred, that the car No. 25 was the only car passing at the time, that the motorman of that car sounded his bell and "slowed up" as he approached Galvez street, from which the cart emerged so suddenly that, so far as he was concerned, the collision was

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unavoidable. There is a preponderance of testimony (though, in view of the character of some of it and of the fact that it conflicts with that offered on behalf of the defense, it is not altogether convincing) to the effect that there were two cars, and that the collision occurred with the second, which followed the first very closely. For the reason above given, the testimony offered on behalf of the plaintiff, to the effect that he actually stopped his cart in order to allow the first car to pass, also fails to carry absolute conviction. There are two witnesses who swear positively that he did not stop it, and, although the plaintiff and his wife testify, in general, to the contrary, we observe that the latter is at one time interrogated, and answers as follows:

"Q. Both he and the boy testified that you came down in a rush and drove right into the car? A. We did not. Mr. Dewez stopped, we heard the bell ringing, and he stopped, *slow*, and waited until the car passed, and not a soul to be seen there." (Italics by the court.)

But, whether the plaintiff stopped his cart, at a distance of ten or fifteen feet from the track, at a point from which he could not have seen a car approaching from the eastward, as he says was the case, or whether he merely "slowed," or whether he neither stopped nor slowed, the admitted fact remains that he attempted to drive onto the defendant's track without once looking to see whether or not, at that moment, a car was approaching; the following statement, in the brief of defendant's counsel, concerning his testimony on that subject being sustained by the record, to wit:

"He was asked 15 times by his counsel why he did not see the car. He answered * * * that he had to watch ahead; * * * that he did not look; * * * that he could have turned around and seen; * * * that he did not know whether he looked or not; * * * that there was no curve in the track; * * * that, on account of the shed, he could not see the car 'far back;' * * * that *there was nothing to prevent his seeing the car;* * * * *that he did not see the car because he did not look for it;* * * * *that he did not look,* because he had to go ahead and serve his customers on Dumaine street; * * * that he looked forward; * * * that there was nothing but the drug store which prevented his seeing, and that this was because there was no window in the side; * * * that it was because the car was behind him; * * * that, in substance, this was the only reason: 'Because I did not see it. * * * I can't tell you the reason why.'" (Italics by the counsel.)

The shed and drug store referred to are situated on the southeast corner of Galvez and Dumaine streets, the shed extending over the banquette to the curbstone; but from a plan, drawn upon a scale, which is in evidence, it appears that from a point 16 feet from the track the plaintiff could have seen,

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outside of the shed, for a distance of 70 feet along the track upon which the car was approaching, and from a point 10, or even 12, feet from the track, he could have seen eastward on Dumaine street for a mile or more. The shed itself, it may be remarked, did not obstruct his view, since the proof is that it is so high that he could have seen under it; but there appears to have been a canvas awning suspended from the roof, which we assume constituted an obstruction. Even so, however, the plaintiff, as we have stated, from the moment that he reached the point at which he says that he stopped, about 3 feet outside of the Dumaine street curb line, could have seen a car at least 70 feet distant to the eastward, and when he reached the curb line which is about 12 feet distant from the track, he had an unobstructed view along Dumaine street to the river. The colliding car could not have been moving very rapidly at the moment of the accident, since, according to the testimony adduced on behalf of the plaintiff, it was stopped within 10 feet of the place at which the collision occurred. It is shown that Dumaine street measures 29 feet in width between curbs, and 53 or 54 feet in width between property lines, and that the distance from the rail upon either side of the track to the curb on the same side is 12 feet. The learned judge *a quo* concludes his opinion by saying:

"My judgment is that plaintiff's contributory negligence was the direct cause of the collision, and that he cannot recover. I can only regret his misfortune. Judgment for defendant."

And from the judgment so rendered the plaintiff has appealed.

Opinion.

We are unable, after a careful consideration of the facts, to reach the conclusion that the motorman of car No. 25 was any more at fault in not seeing the milk cart than was the plaintiff in not seeing the car in time to avoid the collision. If it be true that the car was not visible to the plaintiff until the latter, emerging from Galvez street, reached the curb line of Dumaine street, it is equally true that, until then, the milk cart was not visible to the motorman. And if, from that moment to the moment of the collision, the motorman and plaintiff were each oblivious of the approach of the other, it cannot be said that the motorman was most to blame, or that his negligence, rather than that of the plaintiff, was the proximate cause of the injury, since the car was, at least, as easily seen and heard as the milk cart.

It is admitted that the plaintiff neither looked nor listened, and neither saw nor heard the colliding car until the moment of the collision. The motorman, upon the other hand, says that in approaching Galvez street he sounded his gong and "slowed up," and then, seeing the way clear, again started, "with one notch," when a milk wagon came at a fast trot and dashed into the front part of his car. It appears, however, that he applied

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his brake to such effect that the car was stopped within 10, he says 5, feet of the place where the collision occurred. That the car must have been very near when the plaintiff attempted to drive his cart upon the track is evident from the fact that the points of contact were the right shaft of the wagon and the left front corner of the front platform of the car; and it is equally evident that the two vehicles, traveling upon lines which intersected each other almost at right angles, must have reached the place at which they collided at the same instant, and hence that the car no more ran into the cart than the cart ran into the car; and this would be equally true, whether both vehicles were moving at the same rate or at different rates of speed. It is said that, as one car had just passed, the plaintiff had no reason to expect another, and it is deduced therefrom that he was justified in acting upon the assumption that no other was near, although, by merely turning his head or his eyes, or by listening for a moment, the assumption would have been annihilated by the fact, brought to his notice through his senses. The premise and deduction stated are alike based on the alleged fact, which for the sake of the argument is conceded, that one car had just passed, and, further, upon the following statement, made by the defendant's superintendent, in the course of his testimony, to wit: "No, sir; we have a rule enforcing one block distance between two cars"—which statement was made in response to the question, by counsel for the plaintiff, "You don't know what the distance was between the car that had just passed and the one that did the damage?" We are not specifically informed as to the purpose of the rule referred to, and, in the absence of explanation upon the subject; conclude that it concerns rather the convenience than the safety of the public, and that its enforcement must depend upon varying conditions. Thus, if one car should get out of order, so as to be unable to move with its own apparatus, it cannot be supposed that another would not be allowed to push or trail it to its destination; or, if one car should be delayed by an obstruction, or by taking or discharging an unusually large number of passengers, we should hardly imagine that it would be a violation of the spirit of the rule that another, the motorman of which is instructed to make schedule time, should close up, momentarily, within the proscribed distance. But, however that may be, and assuming that in the case at bar the colliding car had violated the spirit, as well as the letter, of the rule, we are unable to concede that the plaintiff was therefore at liberty to close his eyes and ears, and, because the car was where it ought not to have been, drive into it, or into a position where a collision with it was unavoidable.

The judgment appealed from is therefore affirmed.

CHESAPEAKE & O. RY. CO. v. F. W. STOCK & SONS.

(Supreme Court of Appeals of Virginia, June 15, 1905.)

[51 S. E. Rep. 161.]

Carriers—Actions—Pleading—Declaration.—A declaration against a carrier for loss of goods in transit, alleging the consideration, the promise, the breach, and the giving of the notice of loss required by the bill of lading, states a cause of action in assumpsit upon the contract of carriage.

Same—Bills of Particulars.—In an action against a carrier for the loss of goods in transit, the refusal to require plaintiffs to show in the bill of particulars where the goods and cars were delivered to defendant was not error where defendant was not embarrassed in making its defense by the lack of such statement.

Evidence—Letters—Carbon Copies.—A carbon copy, made at the same time and by the same impression of type as a letter, may be regarded as a duplicate original of the letter itself, and admitted in evidence without notice to produce the letter itself.

Same—Offer of Settlement.*—An offer of settlement, not accompanied with a caution that it is confidential and without prejudice, and not shown to have been made as a concession in an effort to buy peace, is receivable in evidence as an admission.

Carriers—Loss of Goods—Measure of Damages.†—The measure of damages for loss of goods by a carrier is the value of the goods at destination, with interest from the time when the goods should have been delivered, less the unpaid costs of transportation.

Carriers—Connecting Carriers—Liability.‡—A connecting carrier is not liable for a loss not occurring on its portion of the through

*For the authorities in this series on the question of the admissibility of evidence of offers to compromise, see foot-note appended to *Georgia Ry. & Electric Co. v. Wallace & Co.* (Ga.), 16 R. R. R. 793, 39 Am. & Eng. R. Cas., N. S., 793.

†See foot-note appended to *Lewark v. Norfolk & S. R. Co.* (N. Car.), 14 R. R. R. 420, 37 Am. & Eng. R. Cas., N. S., 420.

‡See foot-note appended to *Johnson v. Toledo, S. & M. Ry. Co.* (Mich.), 8 R. R. R. 137, 31 Am. & Eng. R. Cas., N. S., 137; *Lehigh Valley R. Co. v. Dupont* (C. C. A.), 12 R. R. R. 83, 35 Am. & Eng. R. Cas., N. S., 83 (carriers were liable as partners); *Missouri, K. & T. Ry. Co. of Texas v. Harrison* (Tex.), 13 R. R. R. 617, 36 Am. & Eng. R. Cas., N. S., 617 (initial carrier liable for injuries to passenger on connecting line, caused by impossibility to properly heat another car, where it had agreed that passenger should not be obliged to change cars); *Missouri, K. & T. Ry. Co. v. Mazzie* (Tex.), 2 R. R. R. 950, 25 Am. & Eng. R. Cas., N. S., 950 (liability of delivering carrier where decay of fruit began on initial line); note, 9 Am. & Eng. R. Cas., N. S., 290; note, 5 Am. & Eng. R. Cas., N. S., 229 (liability of connecting carrier upon sale of through tickets); note, 2 Am. & Eng. R. Cas., N. S., 11 (liability for loss of baggage); note, 2 Am. & Eng. R. Cas., N. S., 649 (liability in general); *St. Louis, I. M. & S. Ry. Co. v. Edwards* (C. C. A.), 8 Am. & Eng. R. Cas., N. S., 402 (liability for delay in transportation of live stock); *Louisville & N. R. Co. v. Tennessee Brewing Co.* (Tenn.), 4 Am. & Eng. R. Cas., N. S., 661; *Hunting Elevator Co. v. Bosworth* (U. S.), 19 Am. & Eng. R. Cas., N. S., 651 (liability for loss in yard of terminal company); *Illinois Cent. R. Co. v. Foulks* (Ill.), 23 Am. & Eng. R. Cas., N. S., 664 (liability for misbilling freight as affected by relation between carriers created by traffic contract); *Louisville & N. R. Co. v. Breeden* (Ky.), 23 Am. & Eng. R. Cas., N. S., 131 (liability of both companies under contract, construed to be a lease, and not a joint traffic arrange-

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route, unless it stands in the relation of principal and agent, or partner, or some similar relation to the defaulting carrier; and in order to hold it liable facts showing such relation must be alleged in the declaration.

Pleading—Bill of Particulars—Office.—The bill of particulars is no part of the declaration.

Carriers—Connecting Carriers—Through Contracts.**—A bill of lading guarantying a through rate to destination does not establish an agency or partnership relation between the connecting railroads, so as to render one liable for the default of the other.

Trial—Instructions—Sufficiency of Evidence.—A scintilla of evidence, which is not sufficient to support a verdict, does not call for an instruction on the issue to which it is addressed.

Same—Amendment of Requests.—While the court is bound to give any correct instruction applicable to the evidence which is asked for by either party, yet it may refuse to give an incorrect instruction, and need not amend the same so as to accord with the law and the facts, and give it as amended.

Error to Circuit Court of Elizabeth City.

Action by F. W. Stock & Sons against the Chesapeake & Ohio Railway Company. There was a judgment for plaintiffs, and defendant brings error. Reversed.

S. O. Brand and R. G. Bickford, for plaintiff in error.

H. G. Avery and Gordon Paxton, for defendants in error.

KEITH, P.: Stock & Sons made two shipments of flour from points in the state of Michigan to Phœbus, in the state of Virginia. The first shipment was made in October, 1902, in car No. 5,905; the second in February, 1903, in car No. 25,578. There was a loss of goods upon each shipment, for which Stock & Sons brought an action of assumpsit against the Chesapeake & Ohio Railway Company.

The loss claimed upon the goods shipped in car No. 5,905, amounting to \$612.75, was paid into court, and there is no controversy with respect to it, except as to the allowance of interest from November 1, 1902; the contention of plaintiff in error being that it was entitled to reasonable time after the goods should have been delivered to ascertain if it was liable.

The injury to car No. 5,905 occurred on the 18th of October. There is no dispute about the amount of the liability. The money has been paid into court, and, even upon the theory of plaintiff in error as to the extent of its liability for interest, that it was entitled to a reasonable time to investigate as to its

ment); *Smith Bros. & Co. v. New Orleans, etc., R. Co.* (La.), 22 Am. & Eng. R. Cas., N. S., 419 (liability of connecting carriers for breach of contract to carry in bond); *Louisville & N. R. Co. v. Cooper* (Ky.), 17 Am. & Eng. R. Cas., N. S., 304 (liability of connecting carriers for breach of contract to carry in bond); *St. Louis & S. F. R. Co. v. Ostrander* (Ark.), 16 Am. & Eng. R. Cas., N. S., 197 (liability of connecting carrier on unwarranted contract made by agent of initial carrier); *United States Mail Line Co. v. Carrollton Furniture Mfg. Co.* (Ky.), 9 Am. & Eng. R. Cas., N. S., 286.

**See foot-notes appended to *Lehigh Valley R. Co. v. Dupont* (C. C. A.), 12 R. R. R. 83, 35 Am. & Eng. R. Cas., N. S., 83.

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liability, and that pending such inquiry the amount for which it was found to be responsible should not bear interest, we would not disturb the verdict of the jury, which gives interest from the 1st day of November.

The real contention in the case is in respect to plaintiff in error's liability for loss of the goods shipped in car No. 25,578. There seems to be no controversy with respect to the amount of the loss, which was \$758, and a settlement was only prevented by disagreement with reference to the allowance of interest. The parties not being able to agree, this suit was instituted, resulting in a verdict for \$612.75, with interest from the 1st of November, 1902, and for \$758, with interest from March 1, 1903, to be credited by the sum of \$612.75, the amount paid into court.

The first assignment of error is to the judgment of the court overruling a demurrer to the declaration.

We are of opinion that the declaration is sufficient.

Speaking of actions in assumpsit, Hutchinson on Carriers (2d Ed.) at section 744, says: "Notwithstanding these essential differences between actions on the case and in assumpsit against the carrier, it seems to have been in former times a very perplexing question how the one form of action should be distinguished from the other. The declarations in the two kinds of actions, according to approved formulas, were so nearly alike that in many cases the astutest judges became perplexed in their efforts to find out to which class the declarations belonged. It seems, however, to be finally settled that, while the allegation of a promise in the declaration will not be sufficient to impress upon it the distinctive feature of a declaration upon the contract, because the words 'agreed,' 'undertook,' or even the more significant word 'promised,' must be treated as no more than inducement to the duty imposed by the common law, yet, if there be an averment of a promise and a consideration, the declaration will be construed to be upon the contract, and not for the breach of duty. And consequently, when the word 'consideration' was left out, the action was held to be in tort."

The difficulty is doubtless a survival of the time when assumpsit, though founded upon contract, was deemed a species of action on the case, having its origin in a wrong. 4 Cyc. 320. Encyc. Pl. & Pr. vol. 2, p. 988.

The first six counts state a cause of action arising upon an express contract. They set forth the consideration, the promise, the breach, and that notice in writing was given by the plaintiffs to the defendant, as prescribed by the bill of lading. The seventh count is in the usual form of a general count in assumpsit, and is free from objection.

The second assignment of error is to the refusal of the court to require plaintiffs to show in the bill of particulars where the goods and chattels and cars in the bill of particulars mentioned were delivered to the defendant.

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It is evident that the plaintiff in error was not embarrassed or hindered in any degree in making its defense by the lack of this statement, and this assignment of error is overruled.

The third, fourth, seventh, and eighth assignments of error are with respect to the notice of the claim of loss. The court permitted a letter to be introduced from Stock & Sons to A. R. Sydnor, dated March 31, 1903, addressed to him as agent of the Chesapeake & Ohio Railway Company at Norfolk, Va., the receipt of which was acknowledged by Sydnor on April 1, 1903.

The contention of plaintiff in error is that copies of a letter cannot be admitted in evidence where no notice has been given to produce the original, and no foundation laid for the introduction of a copy. To this the defendants in error reply that a letter-press copy is not regarded as equivalent to the letter itself, but a carbon copy, which is made at the same time and by the same impression of type with the letter, may well be regarded as a duplicate original with the letter itself. And we think this position is sound.

- As was said in *Hubbard v. Russell*, 24 Barb. 404: "If two letters are written at the same time to the same person, one being the exact counterpart of the other, one being sent to the person addressed and the other retained by the writer, each is an original, and the one retained may be put in evidence by the party who retained it, without notice to the opposite party to produce the other."

We can find in the record, however, no satisfactory proof that the letter objected to was a carbon copy made at the same time and by the same impression of type with the letter, and therefore to be regarded as a duplicate original of the letter itself.

It is also contended on behalf of the defendants in error that the admission of these letters was at most harmless error, because the stipulation that the carrier shall not be liable for loss or injury unless the claim therefor is presented in writing within a specified number of days after the occurrence of the injury has no application, and is not to be considered in cases where the carrier was of necessity aware of the loss and of its extent, as where there is a complete failure to deliver, or where the injury to the goods was examined by the carrier's agent in person for the purpose of ascertaining its extent—citing 5 Am. & Eng. Ency. 324; 6 Cyc. 506; while in this case both car loads of the damaged flour were sold by the defendant, and the proceeds received by it.

As this case must go back for a new trial upon another ground, when the difficulty here presented can doubtless be obviated, we will pass to the next assignment of error.

It seems that W. L. Williams was local counsel of the Chesapeake & Ohio Railway Company at Norfolk; that a suit had been instituted at Norfolk by Stock & Sons against the Chesapeake & Ohio Railway Company, in which suit were involved a car consigned to Norfolk and also those involved in the present

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suit. Mr. Williams testified that he received from the general counsel of the Chesapeake & Ohio Railway Company, after the institution of the suit at Norfolk, three vouchers, with which to make settlement of the alleged claims, and that he offered a sum in settlement of the suit which aggregated the three vouchers. The contention of the plaintiff in error is that this offer was made by the railway company to buy its peace, and was made for the Kanawha & Michigan Railway Company. The principle is invoked by the plaintiff in error that offers made in an effort to compromise threatened or pending litigation are inadmissible in evidence; that a party may with impunity attempt to buy peace; and that the rule is general both in England and the United States that the offer will be presumed to have been made without prejudice if it was plainly an offer of compromise. *West v. Smith*, 101 U. S. 273, 25 L. Ed. 809.

In *Brown v. Shields*, 6 Leigh, 440, speaking of a letter which was admitted by the trial court over the objection that the offer was made by way of compromise, Judge Carr says: "To my apprehension that letter does not come within the rule of exclusion, according to the authorities cited. There was no treaty for a compromise on foot; the letter asked for none; proposed no meeting, no arbitrators; offered no purchase of peace. Buller says, if the term 'buy their peace' be attended to, they will resolve all doubts on this head of evidence; and Bayley, J., says that the 'essence of an offer of compromise is that the party making it is willing to submit to a sacrifice and to make a concession.' There is no such thing in this letter. The spirit it breathes is wholly different. * * * I do not think that this letter was either written upon a pending treaty for a compromise, or was meant to propose a compromise, or to state terms to which the writer would submit, or sacrifices or concessions which he was willing to make 'to buy his peace.'"

Greenleaf (16th Ed.) vol. 1, § 192, says: "It is to be observed that confidential overtures of pacification, and any other offers or propositions between litigating parties, expressly stated to be made without prejudice, are excluded on grounds of public policy. * * * But if it is an independent admission of a fact merely because it is a fact, it will be received; and even the offer of a sum by way of compromise of a claim tacitly admitted is receivable, unless accompanied with a caution that the offer is confidential."

There was no such caution given in this case, nor can we say that the facts plainly show that the admission was made as a concession or sacrifice, in an effort upon the part of plaintiff in error to buy its peace.

The ninth assignment of error is to the giving of two instructions asked for by defendant in error, the first of which is as follows:

"The court instructs the jury that the measure of damages in case of loss of goods by a common carrier is the value of the

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goods at the destination to which he undertook to carry them, with interest on such value from the time when the goods should have been delivered, after deducting the costs of transportation, if this has not been paid."

The objection urged by the plaintiff in error to this instruction is that the bill of lading provides that the measure of damages in case of loss or injury is the value of the goods at the place and time of shipment, and not at the point of delivery.

The instruction is taken from Hutchinson on Carriers (2d Ed.) § 769, and the rule seems to be a reasonable one.

In the Southern Pacific Co. v. D'Arcais, 64 S. W. 813, the Texas Court of Civil Appeals held that: "The measure of damages for loss of goods by the negligence of a carrier in transportation is the value of the goods at the place of destination. A stipulation in the contract of shipment, limiting the liability to value at place of shipment, will be disregarded as against public policy, notwithstanding it was an interstate shipment."

In Mobile Ry. Co. v. Jurey, 111 U. S. 584, 4 Sup. Ct. 566, 28 L. Ed. 527, the syllabus states that in an action against a carrier for the loss of goods the measure of damages is the value of the goods in the place where they were to have been delivered, with interest. See, also, Railroad Co. v. Williams (Tex. Civ. App.) 31 S. W. 556; Galveston R. Co. v. Ball (Tex. Sup.) 16 S. W. 441.

Plaintiff's second instruction is as follows:

"The court instructs the jury that, even if they believe from the evidence that car No. 25,578, involved in this suit, was wrecked before it came upon the rails of the defendant's road, yet if they also believe from the evidence that the defendant was liable and responsible for the transportation of the said car from the point where the same was loaded to Phoebus, Virginia, then they shall find for the plaintiffs."

The goods in controversy were shipped from a point in Michigan over several connecting lines to Gauley, in the state of West Virginia, where they were to be delivered to the Chesapeake & Ohio Railway for carriage to Newport News. The loss occurred by a wreck which took place before the car in which the goods were shipped had reached the point at which it was to be delivered to the plaintiff in error.

"A connecting carrier cannot, as a rule, be held for the default of the initial or of other connecting carriers, in the absence of a partnership, express or implied." 4 Elliott on Railroads, § 1444.

To impose liability upon a connecting carrier for a loss not occurring upon its portion of the through route, there must be some allegation in the pleadings which establishes the relation of principal and agent, or some similar relation; as, for instance, that they were participants in common in the profits of the business. For a partnership may be formed as well in

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the business of carriers as in any other, and between corporations engaged in that business as well as between individuals so as to make them individually and jointly liable. Hutchinson on Carriers, § 158.

"In suing the last of several connecting carriers for a loss, it is necessary to allege that the carriers were joint contractors, or that the property was delivered to and received by the defendant. If, however, several carriers associate and form a continuous line, and contract to carry goods through for an agreed price, which the shipper pays in one sum, and which the carriers agree to divide among themselves, they are jointly and severally liable for a loss on any part of the line, and the word 'partners,' or any particular word to describe the relation existing between the carriers, need not be used in the petition." 3 Ency. Pl. & Pr. 853.

"The joint arrangement between the connecting lines may be such as to make each the agent for the other in undertaking the continuous transportation of goods." 6 Cyc. 478.

The original declaration in this case charged that the Chesapeake & Ohio Railway Company was a common carrier of goods and chattels, along with other connecting lines, namely, the Lake Shore & Michigan Southern Railway Company and Toledo & Ohio Central Railway Company, which latter carrier, with the defendant, form a part of the railway line known as the "Kanawha Dispatch," which common carriers aforesaid were joint and several contractors for hire, in and by a certain train of railway cars, from a point in Michigan, to Phoebus, Va. But the plaintiffs saw fit to file an amended declaration, in which this allegation does not appear, nor anything which is the equivalent of or akin to it. In the bill of particulars which the plaintiffs filed it is stated that wherever the words "joint and several contractors" occur in the original declaration the same shall for the purposes of the bill of particulars be read as "agents one of the other." But we are confronted with the difficulty that the bill of particulars is no part of the declaration.

The situation, then, is as follows: The original declaration passed out of the case when the amended declaration was filed; the amended declaration does not contain any averment of the relations existing between the Chesapeake & Ohio and the connecting carriers essential to impose liability upon it for a loss sustained before the goods were received by it. The objection would not, indeed, be met if the original declaration is still to be considered as a part of the complaint in the case, for the amended declaration contains seven counts, not one of which makes any reference to the relation under consideration, and there are no means of knowing upon what count the verdict of the jury was founded.

But, apart from the question of pleading, which might have to be disregarded, as objection upon this ground was not made in the trial court, it yet remains that the allegation, if to be considered as sufficiently made, is not supported by the proof.

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The evidence relied upon by the defendants in error to support the instruction which was given, imposing upon the plaintiff in error liability for through carriage, consists of the bill of lading, which contains this statement: "Upon all the conditions, whether printed or written, herein contained, it is mutually agreed that the rate of freight from the above named station to destination is to be 15½ cents per 100 lbs., care of K. D., order F. W. Stock & Sons, notify E. M. Tennis, Phoebus, Va.;" and a letter of E. L. Jamison, introduced by plaintiff in error, which is to the following effect:

"J. F. Orndorff, Esq., A. G. F. A., C. & O. Ry., Richmond, Va.—Dear Sir: East Toledo, O., to Phoebus, K. D. way-bill 27, Feb. 11th, covers C. S. R. car 25578, loaded with 100 barrels of flour and 1600 1-16 sacks of flour, from Hillsdale, Mich., consigned to order F. W. Stock & Sons, notify E. M. Tennis, Phoebus, Va. Unfortunately this shipment was caught in a wreck on our line Feb. 13th, and the flour was transferred into N. Y. P. & O. car 44212.

"Our reports indicate that there was a loss of 32 of the small sacks on account of sacks breaking; also one barrel destroyed; and in addition to this there were about ten barrels with their heads out of one end, allowing some of the flour to fall out. We decided to let this shipment as transferred go forward to final destination. There will, of course, be claim for damages which we will have to stand for, and I give you this information in hopes that you handle the shipment to the best advantage possible.

"I trust that the damage as above indicated will cover it, and that you may be able to make delivery and accept claim for our account for the actual damage. Please advise.

Yours truly, E. L. Jamison."

In *St. Louis Ins. Co. v. St. Louis, etc., R. Co.*, 104 U. S. 146, 26 L. Ed. 679, it is held that the liability of a railroad company for the safe carriage of goods after their delivery to the next succeeding carrier on the route depends upon whether such company in any form assumed or held itself out to the public as assuming such liability. The carrier is only bound to carry safely to the end of its line, and there deliver to the next carrier in the route. An arrangement between a dispatch company and sundry railroad companies, whereby the latter separately agreed to carry all goods for the transportation of which the former should contract at the established tariff rates, or at any special rates furnished by the railroad companies, it was held did not involve joint liability upon the part of the railroad companies, or make them partners, either inter sese or as to third persons.

Now, that case is one where it was sought to hold the initial carrier responsible for a loss occurring after the goods had been delivered by it to a connecting carrier, upon the ground that

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the Erie & Pacific Dispatch Company, in whose custody the goods were when lost, was the agent of the defendant company.

The evidence relied upon in this case does not go further in the direction of establishing an agency among the constituents composing the Kanawha Dispatch than that held to be insufficient in the case just cited. We think that the evidence, as it now stands, is too meager to justify the instruction given.

It is true that what is known as the "scintilla doctrine" has heretofore prevailed in this state, by force of which courts have been required to give instructions, though the evidence by which they were to be supported was such that a verdict founded upon it could not be maintained. In other words, a trial court might, under what is known as the "scintilla doctrine," be reversed for failure to give an instruction which rightly propounded the law, and then be again reversed for sustaining a verdict in obedience to the instruction, because not supported by sufficient evidence. Such a doctrine does not seem consonant with reason, nor promotive of good results in the administration of justice.

The burden, of course, was upon the plaintiffs to make out their case in all its aspects against the defendant, and when it appeared that the loss had occurred before the goods were received by the defendant, the plaintiffs should have shown such relations existing between the road upon which the accident occurred and the plaintiff in error as rendered the latter responsible for the default of the former.

The eleventh assignment of error is a novel one. After the jury had been instructed, plaintiff in error presented the following request to the court:

"The defendant prays the court that, should the hypothesis of the facts whereon the several instructions propounded by it be incorrect, or should the said instructions be inartificially or incorrectly expressed, or should the conclusion of law therein announced be incorrectly stated, that the court will so amend the same as to accord with the facts and law of this case, to the end that the jury may be duly instructed on the phases of the case at bar presented by the said instructions."

Which the court refused, and made upon it the following indorsement:

"The court stands by its action on the instructions as noted thereon (both collectively and generally), in view of the multitude of instructions tendered. The court does not propose to make a summary of them, or to write and give to the jury a dissertation of the law of damages. The court is of opinion that the instructions in this case, as in most similar cases, go beyond the province of instructions, and only tend to confuse the jury, and possibly cause a reversal in the Supreme Court because of error in giving or refusing instructions which do not instruct.

"To which action of the court in so refusing to conform with the said prayer, and the reading of its refusal in the presence

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of the jury, the defendant, by counsel, excepted, and prays that this, its bill of exceptions, marked 13, may be signed, sealed, and made a part of the record in this cause; which is accordingly done."

This court has held in numerous cases that a trial court is bound to give any instruction asked for by either party which correctly expounds the law upon the evidence before the jury. "But if such instruction does not correctly expound the law, the court, as a general rule, may refuse to give it, and is not bound to modify it, or give any other instruction in its place. This principle is founded on good reasons, and is sustained by much authority. A party cannot, by asking for an erroneous instruction, devolve upon the court the duty of charging the jury on the law of the case. An instruction, as asked for, may be so equivocal that to give or refuse it might mislead the jury; and thus it might have all the effect of an erroneous instruction. In such a case it would be proper for the court to modify the instruction so as to make it plain." *Rosenbaums v. Weeden*, etc., 18 Grat. 799, 98 Am. Dec. 737; *B. & O. R. Co. v. Polly, Woods & Co.*, 14 Grat. 448; *Peshine v. Shepperson*, 17 Grat. 472, 94 Am. Dec. 468.

In *Keen's Ex'r v. Monroe*, 75 Va. 428, the court says: "We are of opinion that, after refusing to give the instruction which the defendant below proposed to the court to give, upon the ground that it did not rightly propound the law, it was not incumbent on the court, unasked, to instruct the jury as to what was the law. If an instruction asked does not correctly expound the law, the court, as a general rule, may refuse to give it, and is not bound to modify it, or give any other instruction in its place, unless the instruction asked for is so equivocal that to give or refuse it might mislead the jury. In such case it would be proper for the court to modify the instruction so as to make it plain." *Bertha Zinc Co. v. Martin's Adm'r*, 93 Va. 791, 22 S. E. 869.

It cannot be doubted that, if the instruction correctly states the law, and there be evidence to support it, it should be given. It is equally plain that, if it does not correctly state the law, it should not be given. The sole question is as to the duty of the court to amend an instruction offered by counsel. The rule, as stated in *Rosenbaums v. Weeden*, *supra*, and approved in numerous decisions of this court, is that when an instruction offered is equivocal, so that either to give or refuse it might mislead the jury, the duty is imposed upon the court so to modify it as to make it plain that, if it be right, it should be given; if it be wrong, it should be rejected; if it be equivocal, it should be amended. By what test is a court to measure the duty thus imposed, and how is a jury to be misled by an instruction which the court declines to give? An equivocal instruction of course should not be given, because an equivocal instruction is an inaccurate expression of the law,

. *Arenschield v. Chicago, etc., Ry. Co*

and for that reason should be refused. To say that a jury may be misled by a refusal to give an instruction, and therefore the instruction should be amended and given, is to prescribe a rule so vague and indefinite as to embarrass, rather than to assist, trial courts in the performance of their duty. It is the duty of juries to respect the instructions given them. It is not to be supposed that they have any knowledge with respect to those which the court refuses to give; and, finally, if it be conceded that the offer of instructions, their discussion, and the judgment of the court upon them take place in the presence of the jurors, it is an impeachment of their integrity, or of their intelligence, to assume that they were influenced or misled by what has occurred.

But, however this may be, we know of no authority, in this court or elsewhere, which imposes upon trial courts the burden sought to be placed upon them by the "prayer" under consideration.

The rule which prevails in other jurisdictions is thus stated in *Blashfield on Instructions to Juries*, § 137, and is supported by the great weight of authority: "In order to entitle a party to insist that a requested instruction be given to the jury, such instruction must be correct both in form and substance, and such that the court might give to the jury without modification or omission. If the instruction, as requested, is objectionable in any respect, its refusal is not error. A party cannot complain that the court did not, of its own motion, modify and correct the request, and then give it as corrected. No such duty rests upon the court."

The twelfth assignment of error is to the refusal of the court to set aside the verdict.

As the evidence plainly shows that no damage was sustained by the defendants in error while the goods were in the custody of plaintiff in error, the judgment of the court must, for the reasons herein stated, be reversed, the verdict set aside, and the case remanded for a new trial.

ARENSCHIELD *v.* CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Iowa, Oct. 24, 1905.)

[105 N. W. Rep. 200.]

Master and Servant—Assumption of Risk.*—Where a master is habitually negligent in a certain respect, the servant, by remaining

*For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by servants, see foot-notes appended to *Dunn v. Oregon Short Line R. Co.* (Utah), 16 R. R. R. 741, 39 Am. & Eng. R. Cas., N. S., 741; foot-notes appended to *Southern Pac. Co. v. Gloyd* (C. C. A.), 16 R. R. R. 408, 39 Am. & Eng. R. Cas., N. S., 408; *Southern Ry. Co. v. Logan* (C. C.

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in the service when he knew or ought to have known of such negligence, assumed the risk of injury therefrom.

Same—Burden of Proof.†—In an action for the death of a servant, the plea of assumption of risks not usually and naturally incident to the employment is an affirmative one, and the burden of establishing it is upon defendant.

Same—Evidence—Sufficiency.—Where, in an action for the death of a servant, defendant pleads assumption of risks not naturally incident to the employment, a verdict cannot be directed for defendant or a new trial granted on such ground, unless the testimony is so clear and uncontradicted that no intelligent juror could reach an opposite conclusion.

Same—Question for Jury.—In an action against a railroad company for the death of a servant, where defendant claimed that plaintiff had assumed the risk of the operation of locomotives and cars on a certain track at a high rate of speed, held, under the evidence, that the question whether it had been customary to so operate the engines and cars that deceased must have known of the danger was one for the jury.

Negligence—Contributory Negligence—Question for Jury.—Contributory negligence is peculiarly a question for the jury, and where there is room for reasonable men to reach different conclusions the court cannot direct the verdict of the jury.

Same—Instructions.—In an action against a railroad company for the death of an engineer who was run over while crossing a track in a yard, the court instructed that whether the rate of speed at which the engine was running was a negligent one, and whether it was negligence to fail to give signals of its approach, or to station a man upon the crossing and the rear of the engine, depended upon the place and use made of the crossing, and the warnings, etc. Held that, taken as a whole, the instruction was not open to the objection that the words, "or to station a man upon the crossing or rear of the engine," authorized the jury to find defendant negligent, unless it provided both a lookout on the rear of the engine and a watchman at the crossing.

New Trial—Newly Discovered Evidence—Sufficiency.—In an action for the death of one run over in a railroad yard, a witness having testified that he saw deceased take a drink of whisky shortly before his death, it was not error to refuse a new trial because of the discovery of evidence of another witness who had seen deceased take a drink about the same time and in the same saloon; there being no evidence that deceased was intoxicated.

Same—Cumulative Evidence.—A new trial will not be awarded because of the discovery of evidence which is merely cumulative.

Appeal from District Court, Scott County; D. V. Jackson, Judge.

Action to recover damages for the death of W. S. Arenschield, occasioned by the alleged negligence of the defendant. Verdict and judgment for the plaintiff, and defendant appeals. The material facts are stated more fully in the opinion. Affirmed.

Carroll Wright and Cook & Dodge, for appellant.

Lane & Waterman, for appellee.

WEAVER, J. For several years prior to the accident in ques-

A.), 16 R. R. R. 374, 39 Am. & Eng. R. Cas., N. S., 374; Philadelphia, etc., R. Co. v. Devers (Md.), 16 R. R. R. 366, 39 Am. & Eng. R. Cas., N. S., 366.

†See foot-notes appended to *Chicago & F. I. R. Co. v. Heerey* (Ill.), 9 R. R. R. 26, 32 Am. & Eng. R. Cas., N. S., 26.

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tion W. S. Arenschiold had been in the employ of the defendant as locomotive engineer upon its lines in and about the town of Eldon, Iowa. On January 1, 1903, said engineer was in charge of a locomotive hauling a work train or pile driver on one of the lines of defendant's road, and during the forenoon of that day brought his train into the Eldon yard in order to clear the track for another train. The yard contains several tracks and side tracks, extending substantially east and west, over which engines and trains are frequently moved. These tracks are crossed nearly at right angles by the main track of the Keokuk & Des Moines Railway, a part of defendant's system. West of the Keokuk & Des Moines crossing, and in the midst of the tracks, is a coal chute, which receives its coal from cars hauled to the top of a trestle over a track constructed for that purpose. The trestle is about 14 feet in height, and the track accomplishes the ascent at a maximum grade of 7 per cent., or at the rate of a rise of about 365 feet to a mile. The east end of this sloping track reaches the level of the yards within a short distance west of the Keokuk & Des Moines Railway crossing. Closely bordering upon the yards upon either side are restaurants, saloons, and other buildings. The passenger station or depot building stands at the junction on the north side of the yard we have attempted to describe, and on the east side of the Keokuk & Des Moines track. After bringing in his train, as already stated, Arenschiold left his engine temporarily and went to a restaurant standing just south of the yard and west of the Keokuk & Des Moines track, where he procured a lunch, with which he started back in the direction of the depot building, which was also the general direction of the place where his own engine was standing. His course was along a path or way which had been in use by the public and by railway employees for many years. Standing cars, the number and location of which are variously stated by the witnesses, occupied some or all of the tracks south of the coal chute and west of the Keokuk & Des Moines crossing, thus obstructing his view of the chute and of the track ascending thereto. As he passed from behind these cars and stepped upon the coal-chute track at a point very near the foot of the steep grade to which reference has been made, an engine which was backing down from the top of the trestle ran over him, inflicting injuries from which he soon died.

It is the claim of the administrator of his estate that the injury and death of the deceased were occasioned by the negligence of the defendant and its employees, and without contributory fault on his part. The charge of negligence rests upon the following specifications: (1) That the engine which ran over the intestate was being operated at a reckless and unreasonable rate of speed; (2) that the engine was old and out of repair, and not equipped with proper or effective brakes; (3) that the way or view across the yard was unreasonably obstructed by

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standing cars; (4) that the engine was not of such kind or in such condition that it could properly or safely be operated upon the steep grade of the coal-chute track; (5) that the employee of the defendant operating said engine at the time of the injury was not a skilled engineer, but a fireman who was not only incompetent for the position, but had been maimed by the loss of a part of his right hand, rendering him unfit and unable to properly manage and control the machinery placed in his charge; (6) that the engine was not a switch engine fitted for work in such a yard, but was an ordinary road engine having a high tender, which obstructed the view of the track in that direction by the engine men and was provided with no lookout or guard; (7) that the engine was run backward at a high and reckless rate of speed down the grade of the coal-chute track over the intestate, without giving any warning of its movement by sounding the whistle or ringing the bell; and (8) that the engine was being thus operated without a lookout and without a watchman upon the crossing, in violation of the published rules of the defendant governing the management of the yard and the conduct of its employees. To this charge the defendant answers in denial, and alleges that the intestate was familiar with the yard of the company at Eldon, and knew that engines and trains were frequently operated upon and over its tracks at a high rate of speed, and sometimes without the customary signals and without a watchman stationed at the crossing, whereby it is alleged said intestate, by remaining in the defendant's service, assumed the risk of injury from such causes. It is further alleged that the danger to which the intestate was exposed by reason of the conditions alluded to "was a risk incident to the service which he contracted to perform," and defendant cannot be held liable for injuries thus occasioned to him.

1. It is the contention of the appellant that the verdict for damages to Arenschield's estate is not sustained by the evidence. In support of this proposition it is not claimed or argued in this court that no negligence has been shown on part of appellant, but it is strongly insisted that such negligence, if any, pertained to the usual or habitual, or at least the frequent, method of handling and moving switch engines and other engines and cars in and through the yard of the appellant at Eldon, with all of which Arenschield had long been familiar, and must be held as a matter of law to have assumed the risk of injury therefrom. It may, for the purposes of the case, be conceded that a master may say to a servant suing on account of injuries occasioned by the master's negligence, "You knew or ought to have known that I have been habitually negligent in respect to the matter charged, and, in entering or remaining in my service when you knew or ought to have known of such practice, you took upon yourself the risk of injury at my hands"; but it is a doctrine which the courts are not inclined to extend beyond the limits fairly indicated by controlling precedents. Moreover, the plea

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of assumption of risks not naturally and usually incident to the employment when properly conducted is an affirmative one, and the burden of its establishment is upon the employer. The trial court could not properly have directed a verdict or granted a new trial on the ground, unless the testimony in support of the plea was so clear and uncontradicted that no intelligent fair-minded juror could reach the opposite conclusion. That such is not the state of the record we are well satisfied. It is fairly shown that Arenschield had formerly operated a switch engine in the Eldon yard, and thereafter was frequently upon and about the crossing where he was killed, and must have been to some degree familiar with the customs there prevailing; but the general or habitual operation of engines down the coal chute grade at high or dangerous rates of speed is not so clearly or indisputably shown that we may say, as a matter of law, that, if deceased did not know it, he ought to have known it and governed himself accordingly. One witness, at least, testifies, in substance, that the usual speed did not exceed six miles an hour, and that the speed of the engine at the time of the accident was not in excess of that rate. Another says the usual speed on this track was from five to six miles an hour. Another speaks of the usual speed as a "moderate gait," whatever that may mean. Others place the speed at the time of the accident at from 12 to 20 miles an hour. Several witnesses aver that trains and engines were quite frequently moved over the crossing at comparatively high speed, and without the signals prescribed by law and the rules of the company; but, few, if any, connect this negligent or reckless practice with the use of the coal chute track. As we have already described, this track differed from all others in the yard in its construction and use. From the coal chute it descended a very steep grade to a point near the Keokuk & Des Moines crossing, and in the very nature of things an engine could not be sent backward down this hill at such a high rate of speed without much greater danger than would arise from indulgence in the same rate of speed upon the other tracks of the yard. There is no evidence that Arenschield himself used the track in this matter, and, if it was so used by others, the inference of knowledge thereof on his part is one for the jury and not for the court.

It is not claimed that the deceased was a trespasser, or that (except for the alleged assumption of risk) he was not entitled to rely upon the exercise of reasonable care by the appellant and its employees in the operation of its trains and engines in the yard. The instructions given upon this branch of the case state the rules of law applicable thereto with marked simplicity and clearness, and their entire fairness to appellant is conceded by counsel. Such being the case, and the affirmative defense put forth by the appellant not being so clearly established as to justify a peremptory instruction against the plaintiff, there was no error in refusing to set aside the verdict.

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It is suggested, but not argued, that the jury should have found for the appellant on the ground that deceased was chargeable with contributory negligence. We shall not extend this opinion to any discussion of the testimony in this respect. Contributory negligence is peculiarly a question for the jury, and, where there is room for reasonable and fair-minded men to reach different conclusions upon the facts disclosed on the trial, the court cannot assume to direct or interfere with the verdict of a jury which has been properly instructed upon the law of the case. Under this rule, so well established that it would be idle to cite authorities in its support, we have to say the record discloses no error in the ruling of the trial court. There is much evidence in the case, bearing upon the several allegations of negligence, which we do not attempt to recite or comment upon, preferring to dispose of the appeal upon the points principally argued by counsel. As usual in this class of controversies, there is much conflict in the testimony; but we think the issue was in every respect properly submitted to the jury, and no error is shown calling for a reversal of the judgment.

2. Error is assigned upon the eighth paragraph of the court's charge, which reads as follows: "(8) Whether the rate of speed at which engine No. 587 was running at the time it is alleged to have struck Arenschield was a negligent rate, and whether or not it was negligence to fail to give signals of its approach, or to station a man upon the crossing and the rear of the engine, if you find from the evidence there was a failure either or both respects, depends upon the place, the use made of such crossing, and the surroundings of said crossing at the time, as known by those in control or charge of said engine; it being defendant's duty to so operate and move its engines over said crossing as not to needlessly endanger persons rightfully thereon." It is said in support of this exception that the words, "or to station a man upon the crossing and the rear of the engine," as employed in this paragraph, authorized the jury to find the appellant chargeable with negligence, unless it provided both a lookout on the rear of the engine and a watchman on guard at the crossing; and that "there is no evidence of any rule, practice, or custom ever prevailing or known whereby the defendant was required, or in the exercise of due care should have been required," to take both of these precautions against possible accident. Segregating a single clause of this paragraph from its context, it may be given the meaning put upon it by counsel; but, when taken as a whole, it is not fairly susceptible of such construction. The court was calling attention to the various acts or phases of negligence alleged by the plaintiff, and said to the jury, in substance, that whether there was any want of reasonable care on part of defendant in either or all of these respects depended upon the surrounding circumstances and the nature and extent of the apparent dangers to be guarded against.

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Of this statement it is obvious that neither party may properly complain. In saying this we do not mean to be understood as holding that, even as interpreted by counsel, the instruction would necessarily be held erroneous. We are not prepared to say that if defendant's engine, equipped with a high tender shutting off a view of the track from the enginemen, was sent backward at a high rate of speed down the sharp grade from the chute and over the crossing at its foot, the jury may not have been justified in finding that due care for the lives of those rightfully in and about the yard at that point required both a lookout on the engine and a watchman at the crossing. Generally speaking, the court cannot tell the jury what acts do or do not constitute due care, but must leave the question for their determination from all the proved facts and circumstances.

3. Upon the trial the defendant introduced a witness, one La Fever, who testified to having seen Arenschield take a drink of whisky a short time before he met his death in defendant's yards. Among the grounds stated in the motion for a new trial was the discovery of new evidence, in that another witness, one Kuhns, had been found who would testify to having seen deceased take a drink of whisky about the same time and in the same saloon referred to in La Fever's testimony; and this, it is argued, should have been held sufficient ground for setting aside the verdict. Counsel can hardly be serious in this contention. The stories of the two witnesses La Fever and Kuhns evidently refer to the same circumstance. Taking all they both say as literally true, its effect is to prove that Arenschield on that morning took a single drink of intoxicating liquor. There is not a scintilla of evidence that he was in the least degree intoxicated or his faculties in any manner impaired by reason of the drink in which he had indulged. In any event, the new evidence was clearly cumulative, and the motion based thereon was properly overruled.

No reversible error being shown, the judgment of the district court is affirmed.

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(Supreme Court of North Carolina, Nov. 15, 1905.)

[52 S. E. Rep. 129.]

Trial—Motions for Nonsuit—Construction of Evidence.—On a motion for nonsuit or direction of verdict for defendant, the evidence of plaintiff must be accepted as true, and construed in the light most favorable to him.

Master and Servant—Injuries to Servant—Negligence of Master—Sufficiency of Evidence.—In an action against a railroad for injuries to a brakeman, who was shaken off the pilot of an engine which did not have a bar to which the brakeman could hold, evidence held to make a case for the jury on the question of the railroad's negligence.

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Same—Contributory Negligence—Dangerous Work.*—The mere fact that a servant works in the performance of a dangerous duty, such as riding on the pilot of an engine without having any rod by which to hold, while it may charge him with the assumption of the risk, does not render him guilty of contributory negligence.

Same—Assumption of Risk—Defective Appliances—Statutory Provisions.—Under Priv. Laws 1897, p. 83, c. 56, giving a right of action to any employee who is injured by defects in the machinery, ways, or appliances of a railroad, and declaring any contract or agreement by an employee to waive the benefits of the statute void, a railroad cannot defend an action for injuries to a brakeman, caused by a defective engine or appliance, on the ground that the brakeman assumed the risk of the defect.

Same—Contributory Negligence.—While, under Priv. Laws 1897, p. 83, c. 56, a railroad employee is not precluded, on the ground of assumption of risk, from recovering against the railroad for injuries caused by a defective engine or appliance which make the performance of his duty obviously dangerous, yet he must act with due care and circumspection under the circumstances, and cannot recover if he is careless in such manner as to amount to contributory negligence.

Same—Violation of Master's Rules.†—The violation by a railroad brakeman of a known rule of the company, made for the protection and safety of employees, which rule is alive and enforced, will usually bar a recovery for injuries to the brakeman proximately caused by such violation.

*For the authorities in this series on the question whether it is contributory negligence on the part of an employee to work when he knows he is subjected to dangerous conditions, see *Brinkmeier v. Missouri Pac. Ry. Co.* (Kan.), 15 R. R. R. 349, 38 Am. & Eng. R. Cas., N. S., 349 (using coupling with knowledge of defect); *Harrill v. South Carolina & G. E. R. Co.* (N. Car.), 12 R. R. R. 725, 35 Am. & Eng. R. Cas., N. S., 725 (going on defective trestle with knowledge of its defective condition); *Western Ry. of Alabama v. Arnett* (Ala.), 9 R. R. R. 132, 32 Am. & Eng. R. Cas., N. S., 132 (trackman riding on hand car holding on to defective brace, when chargeable with notice of its condition, was not necessarily guilty of); *Cogdell v. Southern Ry. Co.* (N. Car.), 4 R. R. R. 39, 27 Am. & Eng. R. Cas., N. S., 39 (undertaking dangerous work); *Northern Pac. R. Co. v. Egeland* (U. S.), 4 Am. & Eng. R. Cas., N. S., 259 (alighting from moving train at command of superior); *McDonnell v. Illinois Cent. R. Co.* (Iowa), 11 Am. & Eng. R. Cas., N. S., 534 (employee walking in unlighted round-house killed by falling into pit of which he had knowledge); *Beal v. Atchison, T. & S. F. Ry. Co.* (Kan.), 18 Am. & Eng. R. Cas., N. S., 751 (servant working for master, when he knows of master's reckless habits, is guilty of contributory negligence); *Cole v. North Carolina R. Co.* (N. Car.), 23 Am. & Eng. R. Cas., N. S., 885 (using defective drainpipe in climbing upon engine); foot-notes appended to *Kansas City, etc., R. Co. v. Thornhill* (Ala.), 14 R. R. R. 851, 37 Am. & Eng. R. Cas., N. S., 851, foot-notes appended to *Weed v. Chicago, etc., Ry. Co.* (Neb.), 13 R. R. R. 797, 36 Am. & Eng. R. Cas., N. S., 797; *Stewart v. Texas & P. Ry. Co.* (La.), 13 R. R. R. 158, 36 Am. & Eng. R. Cas., N. S., 158 (doing dangerous work in obedience to orders); *Brinkmeier v. Missouri Pac. Ry. Co.* (Kan.), 15 R. R. R. 349, 38 Am. & Eng. R. Cas., N. S., 349 (using appliance with knowledge of defect).

†For the authorities in this series on the subjects of assumption of risks by, and contributory of, employees when violating rules or orders, see foot-notes appended to *Illinois Cent. R. Co. v. Stith's Adm'x* (Ky.), 16 R. R. R. 729, 39 Am. & Eng. R. Cas., N. S., 729; *Moore v. St. Louis, etc., Ry. Co.* (La.), 16 R. R. R. 370, 39 Am. & Eng. R. Cas., N. S., 370; *Demko v. Carbon Hill Coal Co.* (C. C. A.), 16 R. R. R. 232, 39 Am. & Eng. R. Cas., N. S., 232; foot-note appended

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Same—Abrogated Rules.‡—A rule of a master, promulgated for the protection and safety of servants, which is habitually violated to the knowledge of the master or those who stand towards him in the position of vice principals, or which has been violated so frequently and openly and for such a length of time that the master could, by the exercise of ordinary care, have ascertained its nonobservance, will be deemed waived or abrogated, and a failure of a servant to observe the same will not preclude him from recovering for injuries sustained by reason of such nonobservance.

Appeal from Superior Court, Anson County; Ward, Judge.

Action by David Biles against the Seaboard Air Line Railway Company. From a judgment of nonsuit, plaintiff appeals. Reversed.

Civil action to recover damages for an injury caused by alleged negligence on part of defendant company. The three ordinary issues in actions of this character were framed for submission to the jury: (1) As to the negligence of defendant; (2) as to contributory negligence on the part of plaintiff; (3) on the question of damages. At the close of the testimony, on an adverse intimation of his honor, both on the first and second issues, the plaintiff submitted to a nonsuit and appealed.

H. H. McLendon and J. A. Lockhart & Son, for appellant.

John D. Shaw and Adams, Jerome & Armfield, for appellee.

HOKE, J. (after stating the case). In *Hopkins v. Railroad*, 131 N. C. 464, 42 S. E. 902, Douglas, J., delivering the opinion said: "It is well settled that on a motion for nonsuit, or its counterpart, the direction of a verdict, the evidence of the plaintiff must be accepted as true and construed in the light most favorable to him." Applying this rule to the facts set forth in the case on appeal, we are of opinion that the plaintiff is entitled to have his cause submitted to a jury. The plaintiff himself testified that he was a brakeman on a freight train of defendant company, and on the night of November 29, 1902, was injured by having his foot run over and crushed by the engine of the train with which the plaintiff was then working; that the injury occurred as the train was entering on the yard at Hamlet, N. C., where there were a great many tracks and switches; that it was a part of the plaintiff's duties at such times to keep a lookout in front of the engine, and his proper placing for the purpose was on the pilot of the engine.

Selecting a portion of his testimony from the notes of the evidence sent with the case in the form of questions and answers we find this statement: "Q. Go on and state how you were hurt. A. I was on the front part of the engine on the standard

to *Canadian Pac. Ry. Co. v. Elliott* (C. C. A.), 15 R. R. R. 621, 38 Am. & Eng. R. Cas., N. S., 621.

‡For the authorities in this series on the subject of the waiver of rules made for the guidance and protection of railroad employees, see foot-notes appended to *Canadian Pac. Ry. Co. v. Elliott* (C. C. A.), 15 R. R. R. 621, 38 Am. & Eng. R. Cas., N. S., 621.

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step, where I always had to ride, going into a yard. Q. Why did you ride there going into the yard? A. To look out for the switches and loose cars. Q. Why did you ride there to look out for switches? A. That was my duty. Q. To look out for switches and cars? A. Yes; loose cars would roll down sometimes, and we would change the switches right quick. I would always have to head, so I could throw the switch. Q. What do you mean by throwing the switch? A. Changing the switch from one track to another. Q. That is, you kept the switches in their proper place and order? A. Yes." At another point the plaintiff testified that he could not properly perform the duties, unless he was stationed in front on the pilot, and that the defendant would not keep a man who could not keep the train moving, but was so slow that he would require it to stop to enable him to do his work; that in order to enable employees, charged with this duty, to hold their positions, there was usually a short step on the face of the pilot, eight to ten inches long and wide enough for the placing of one foot, and a bar or rod along the beam of the pilot, by which the brakeman could hold on with reasonable safety when the train was in motion; that this particular engine had the step, but did not have the rod or other means to enable the plaintiff to hold properly, and, as the engine was going into the yard, it jostled or careened in some way—probably by a depression in the rail; that the plaintiff's foot was jarred from its position on the step, and, not being able to hold, his foot slipped under the fore wheel of the engine, was crushed as stated, and finally had to be amputated, etc. If these facts are established, there would seem to be a case of negligent injury, not unlike that of *Coley v. Railroad*, 128 N. C. 534, 39 S. E. 43, 57 L. R. A. 817, 83 Am. St. Rep. 720; and unless the facts are successfully controverted, or the plaintiff himself has failed to exercise proper care in the matter, there would be an actionable wrong.

The judge below also expressed an intimation adverse to the plaintiff on the issue of contributory negligence. Without going into a detailed statement of the testimony, we are of opinion that on this issue, also, the case should be submitted to the jury under proper instructions. The plaintiff had stated in one place that it was a dangerous duty, and he had looked for some one to get hurt in performing it. But, so far as the mere working on in the performance of a dangerous duty is concerned, this, while sometimes spoken of as contributory negligence, is usually and more properly classed and considered under the head of assumption of risk, and, being a contractual defense, where it is allowed, is not open to the defendant by reason of the statute. Priv. Laws 1897, p. 83, c. 56, § 1. This statute provides that any employee who is injured by any defect in the machinery, ways, or appliances of a railroad company shall be entitled to maintain an action; and section 2 provides that any contract or agreement, express or implied,

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made by any employee to waive the benefit of the aforesaid section, shall be null and void. If, in answer to the first issue, the jury should find that the plaintiff, while in the performance of his duty, was injured as the proximate consequence of a defective engine or defective appliance, then the defense of assumption of risk is not open to the defendant. *Coley v. Railroad*, supra; s. c., 129 N. C. 407, 40 S. E. 195, 57 L. R. A. 817. While the mere working on in the presence of known and dangerous conditions, but in the honest effort to discharge his duty faithfully, usually treated under the head of assumption of risk, shall not be considered in bar of the plaintiff's recovery, this does not at all mean that in cases of the kind we are now considering the plaintiff is absolved from all care on his own part. Except in extraordinary and imminent cases, like those of *Greenlee and Troxler*, 122 N. C. 977, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734, and 124 N. C. 189, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580, he is still required to act with that due care and circumspection which the presence of such conditions require, and if, apart from this element of assumption of risk, the plaintiff has been careless in a manner which amounts to contributory negligence, his action must fail.

There is evidence here tending to show that the plaintiff, at the time of the injury, in taking his position on the pilot of the engine, was acting in violation of the rules of the company. While the disposition of the present appeal does not require that we consider evidence making for the defense, we deem it well to note that the violation of a known rule of the company, made for an employee's protection and safety, when the proximate cause of such employee's injury, will usually bar a recovery. This is only true, however, of a rule which is alive and enforced, and does not obtain where a rule is habitually violated to the knowledge of the employer or of those who stand towards the employer in the position of vice principals, or when a rule has been violated so frequently and openly, and for such a length of time, that the employer could, by the exercise of ordinary care, have ascertained its nonobservance. Under such circumstances the rule is considered as waived or abrogated. 5 *Thompson, Law of Negligence*, § 5404; *Beach, Cont. Neg.*, § 373.

There was error in the ruling of the court below, and the plaintiff is entitled to have his cause submitted to the jury.

New trial.

CLARK, C. J., and WALKER, J., concur in result.

CINCINNATI, N. O. & T. P. RY. CO. *et al.* v. HILL'S ADM'R.

(Court of Appeals of Kentucky, Dec. 1, 1905.)

[89 S. W. Rep. 523.]

Master and Servant—Death of Servant—Railroads—Evidence—Findings.—In an action for death of a railroad brakeman by being struck by a train on defendant's main track approaching from the rear, evidence held insufficient to sustain a finding that deceased was standing on the main track with his back to the train that struck him and in plain view of its operatives for several hundred yards before they arrived at the place of the accident.

Same—Speed—Negligence.—In the absence of some rule or regulation limiting the speed of cars on defendant's main track at the place defendant's brakeman was run into and killed while standing thereon repeating signals, defendant was not negligent in running the train that struck deceased faster than the usual speed at that point.

Same—Duty to Warn—Lookout.*—If the place where deceased, one of defendant's brakemen, was struck and killed by one of its trains, was one where the presence of persons on the track was reasonably to be expected, it was incumbent on the operatives of the train by which deceased was killed to give reasonable warning of its approach by blowing the whistle or ringing the bell, and to keep a reasonable lookout in front of the train as it was moved.

Same—Care Required of Deceased.†—Where a railroad brakeman was stationed at a curve to repeat signals, it was incumbent on him to exercise reasonable care to watch for the approach of trains and keep out of their way, so that no recovery could be had for his death by being struck by a train approaching him from the rear, unless reasonable warning was not given and a reasonable lookout was not kept, and by reason of this he was killed while exercising ordinary care for his own safety.

Same—Contributory Negligence.‡—Where deceased, a railroad brakeman, went on the track so close to defendant's approaching train that injury to him could not be averted by those in charge of the train by reasonable care after they discovered his danger or could have perceived it by the exercise of ordinary care, defendant was not liable.

Same—Fellow Servants—Different Train Crews.§—Members of a switching crew in charge of a different train from that on which de-

*For the authorities in this series on the question of the care due licensees and trespassers on railroad tracks, see foot-notes appended to *St. Louis S. W. Ry. Co. v. Purcell* (C. C. A.), 16 R. R. R. 779, 39 Am. & Eng. R. Cas., N. S., 779; *Ayers v. Wabash R. Co.* (Mo.), 16 R. R. R. 470, 39 Am. & Eng. R. Cas., N. S., 470; *Clemans v. Chicago, etc., Ry. Co.* (Iowa), 16 R. R. R. 413, 39 Am. & Eng. R. Cas., N. S., 413.

†For the authorities in this series on the question as to what degree of care is required of a servant for his own protection, see foot-notes appended to *Foster v. New York, etc., R. Co.* (Mass.), 14 R. R. R. 343, 37 Am. & Eng. R. Cas., N. S., 343.

‡For the authorities in this series on the question of the degree of care required of those in charge of a train after discovering a person in a perilous situation upon the track, see foot-notes appended to *Rawitzer v. St. Paul City Ry. Co.* (Minn.), 13 R. R. R. 91, 36 Am. & Eng. R. Cas., N. S., 91.

§For the authorities in this series on the question of the care due an employee, see foot-notes appended to *Dean v. Oregon R. & Nav. Co.* (Wash.), 16 R. R. R. 237, 39 Am. & Eng. R. Cas., N. S., 237.

§For the authorities in this series on the question whether train-

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ceased was employed as a brakeman were not fellow servants with him.

Same—Duty to Maintain a Lookout—Negligence of Master.—**Where members of a switching crew were bound to maintain a lookout for persons on the track, their negligence in failing to do so was chargeable to the railroad company in an action for death of a brakeman who was struck by a train in charge of such crew.

Same—Grade of Servant.††—The liability of a master for injuries to a servant by the negligence of another servant does not depend on the grade of the servant by whose negligence the injury occurred, but on the duty which he is discharging at the time.

Same—Duty to Warn—Negligence of Master.‡—In an action for death of a railroad brakeman by being struck by a train approaching him from the rear, the negligence of the operatives of such train, whose duty it was to give warning of its approach and to see that such warning was given, in failing to perform such duty, was the negligence of the railroad company.

Same—Evidence.—In an action for death of a brakeman by being struck by a train approaching him from the rear while he was standing on defendant's main track repeating signals, evidence that deceased could have stood between the two tracks, or a few feet north or south of where he was, and been in a place of safety, was admissible.

Same.—Where, in an action for death of a brakeman by being struck by a train approaching him from the rear, defendant claimed that deceased stepped from a place of safety onto the track when it was too late to prevent injuring him, evidence that there was nothing in deceased's conduct or in the surrounding circumstances to indicate to the operatives of the train that he would come on the track until he walked thereon just in front of the train was admissible.

Appeal from Circuit Court, Boyle County.

"Not to be officially reported."

Action by C. M. Hill's administrator against the Cincinnati, New Orleans & Texas Pacific Railway Company and others. From a judgment for plaintiff, defendants appeal. Reversed.

Charles H. Rodes, John Galvin, and C. R. McDowell, for appellants.

Robert Harding, Rawlins & Voris, E. V. Puryear, and Greene & Van Winkle, for appellee.

HOBSON, C. J. C. M. Hill was a brakeman in the service of appellant Cincinnati, New Orleans & Texas Pacific Railway Company. On the morning of November 12, 1903, about 7 o'clock, he was in the yard at Burgin, Ky., serving on what was

men of different trains are fellow servants, see foot-note appended to *Rosney v. Erie R. Co.* (C. C. A.), 16 R. R. R. 751, 39 Am. & Eng. R. Cas., N. S., 751.

**For the authorities in this series on the question what are the nonassignable duties of a railroad company as a master, see foot-notes appended to *Philadelphia, etc., R. Co. v. Devers* (Md.), 16 R. R. R. 366, 39 Am. & Eng. R. Cas., N. S., 366; *Richey v. Southern Ry. Co.* (S. Car.), 14 R. R. R. 526, 37 Am. & Eng. R. Cas., N. S., 526.

††For the respective jurisdictions where the superior servant limitation of the fellow servant rule is, and is not, recognized, see extensive note, 16 R. R. R. 146, 39 Am. & Eng. R. Cas., N. S., 146.

‡See foot-note on preceding page.

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called the "water train." The water train was made up of a lot of tanks on cars and was used in dry weather in hauling water by the company for its own use. The water train was on what is called the "passing track," which is the first track east of the main track and about 9 feet from it. The switch engine and crew pulled out southward with about 18 cars and a caboose. When it reached the main track, about 1,000 yards south of where the water train was, it pulled in on the main track, and then backed on the cross-over to a track on the west of the main track, where it left 14 cars nearly opposite the water train. It then pulled back to the main track with the caboose and 3 or 4 cars attached to it, and when it reached the main track commenced backing northward over the main track for the purpose of going north of the station with these cars. While this was going on the water train was throwing some cars back of it on another track around a curve. By reason of the curve the engineer could not see the brakeman who was cutting loose these cars or receive his signals. So Hill was receiving the signals from the brakeman at a point near the center of the curve and repeating them to the engineer. To do this while he had his face turned to the brakeman to receive the signals he walked over on the main track and was standing with one foot on either side of the rail repeating the brakeman's signals to the engineer. While he was in this position the switch crew backed up the main track as above stated and ran over him and killed him. The jury returned a verdict in favor of his administrator for \$5,000 against the railroad company and members of the switching crew, and the defendants appeal.

It is insisted for the plaintiff that Hill was standing on the main track with his back to the south, receiving the signals from the brakeman of his train, when the switching crew came back from the west side of the road on the main track, and that he was in plain view of them, standing with his back to them giving the signals, for several hundred yards before they struck him. On the other hand, it is insisted for the defendants that Hill was standing between the two tracks until the cars were within 15 or 30 feet of him, and then walked upon the main track just in front of the cars with his back to them, when it was too late for them to prevent running over him. There was proof by the plaintiff to the effect that no signals were given of the approach of the cars as they were backed by the switching crew. We do not think that the verdict can be sustained on the idea that Hill was standing on the main track, as contended by the plaintiff. While one witness for the plaintiff on his direct examination does so state, on his cross-examination his testimony is much the same as the witnesses for the railroad company, who are not only the switching crew, but the crew on Hill's own train, and all state that Hill was between the two tracks until the cars were within a few feet of him, when he went over to the main track just in front of them. Another

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witness for the plaintiff states that he saw Hill standing on the main track giving signals, but this witness does not state how long he had been there, as he first noticed him when the cars were very close to him. In fact, there does not seem to be any real inconsistency in the testimony of the witnesses on either side, when analyzed, on this subject.

There was proof on behalf of the plaintiff that the cars which ran over Hill were running about 20 miles an hour, and that the usual rate of speed in the yard was 6 or 8 miles an hour. No rule was introduced or regulation of any sort limiting the speed of cars on the main track at this point, and the company had a right to run its cars at any rate of speed it saw proper, so far as the proof goes. As to whether signals of the approach of the backing train were given the proof is conflicting; the proof for the defendant being that they were given both by blowing the whistle and ringing the bell, and the proof by the plaintiff being in effect that no signals were given.

The court qualified instruction 4 as to contributory negligence by adding to it in substance that the jury might find for the plaintiff, although there was contributory negligence on the part of Hill, if those in charge of the switching train discovered Hill on the track in time to stop it before running over him. In lieu of instruction 4, under the evidence, the court should have instructed the jury that, if the place where the deceased was killed was one where the presence of persons on the track was reasonably to be expected, it was incumbent on those running the train to give reasonable warning of its approach by blowing the whistle or ringing the bell and to keep a reasonable lookout in front of the train as it was moved; that it was incumbent on the deceased to exercise reasonable care to watch for approaching trains and keep out of their way; that if reasonable warning of the approach of the train was not given, or a reasonable lookout was not kept, and by reason of this Hill was run over and killed while exercising ordinary care for his own safety, they should find for the plaintiff; also that if Hill failed to exercise reasonable care for his own safety, or if reasonable warning of the approach of the train was given and Hill went upon the track so close to the approaching train that the injury to him could not be averted by those in charge of the train by reasonable care after they perceived his danger, or could have perceived it by the exercise of ordinary care, the jury should find for the defendants. Reasonable or ordinary care is such care as may be usually expected of ordinarily prudent persons under like circumstances. If the place where the deceased was killed was not one where the presence of persons on the track was reasonably to be expected, the defendants were not bound to give warning of the approach of the train, or to keep a lookout for such persons, and the jury should find for the defendants. *L. & M. R. R. Co. v. Lowe*, 80 S. W. 768, 25 Ky. Law Rep. 2317, 65 L. R. A. 122, and cases cited.

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The difficulty with the instructions given by the court is that they left the jury to judge of the law and the facts, as they were so general in terms as not to inform the jury of the law applicable to the different states of fact tended to be shown by the evidence. On another trial the court will omit instructions 1 and 2. Instruction 3, with the instructions that we have indicated, and instruction 5, will contain the whole law of the case, except that No. 3 should be qualified by adding to it that, if either Chawk, Curd, or Sanders was not negligent, they should find for him. The word "joint," before the word "negligence" in instruction 3, may be omitted.

The members of the switching crew were in charge of a separate train from Hill, and were not fellow servants with him, under the rule in this state. *Kentucky Central Railroad v. Ackley*, 87 Ky. 278, 8 S. W. 691, 12 Am. St. Rep. 480; *Cincinnati, N. O. & T. P. R. R. Co. v. Palmer*, 98 Ky. 382, 33 S. W. 199; *Cincinnati, N. O. & T. P. Ry. Co. v. Roberts*, 62 S. W. 901, 23 Ky. Law Rep. 265, and cases cited. As the engineer could not see in front on account of the cars he was backing, Curd was on the front car to maintain a lookout. The duty to maintain a lookout was incumbent on those in charge of the train as the agents of the company in moving it, and if the person whose duty it was to maintain a lookout was negligent his negligence is chargeable to the master. The liability of the master for the act of the servant does not depend upon the grade of the servant, but upon the duty which he is at the time discharging. The same is true of Sanders, whose duty it was to ring the bell or blow the whistle; also of Chawk, who was in charge of the engine and train, and should have seen that proper warning was given.

The defendant offered to prove on the trial by several witnesses that Hill could have stood between the two tracks and given the signals and been in a place of safety. This proof should have been admitted. The proof offered by the defendant to the effect that Hill could have gone a few feet north or south of where he was and been in a place of safety should also have been admitted. One question the jury are to determine is whether Hill exercised reasonable care under the circumstances, and to enable them to determine this question intelligently the proof as to the circumstances surrounding Hill should be admitted, so that they, in determining the question, may understand just how he was situated. It was an important fact for the plaintiff to establish that he was on the main track in the discharge of his duties, and, this being so, it was proper for the defendant to show that it was not necessary for him to be there in the discharge of his duties; for the jury are to determine whether, under all the circumstances, he exercised such care as may be usually expected of a person of ordinary prudence situated as he was. Curd should also be allowed to state

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that there was nothing in Hill's conduct or in the surroundings to indicate that he would come on the main track and that Curd had no reason to suppose that he would come on the track until he walked upon it just in front of the train.

Judgment reversed, and cause remanded for a new trial.

VISSMAN v. SOUTHERN RY. CO.

(Court of Appeals of Kentucky, Nov. 15, 1905.)

[89 S. W. Rep. 502.]

Master and Servant—Injury to Servant—Res Ipsa Loquitur.*—Mere proof of accident or injury to a servant does not raise a presumption of negligence on the part of the master.

Same—Materials—Character—Duty of Master.†—A railroad company does not owe to a fireman the duty to furnish coal for use in its engines which is absolutely safe, but only such coal as is reasonably safe for the purpose intended.

Same—Evidence.—Plaintiff, an experienced railroad fireman, was injured by a small piece of coal or slate flying into his eye as he was attempting to break a lump of coal for use in the engine. The presence of the slate was not discoverable before the application of the pick, and there was evidence that the breaking of lumps of the best quality of coal is usually attended with the flying of small pieces, which frequently strike the person doing the breaking. Held, that defendant was not guilty of negligence, rendering it liable for such injuries, in providing a poor quality of coal for use in its engines, against which plaintiff had previously objected.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"Not to be officially reported."

Action by John F. Vissman against the Southern Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Benjamin F. Gardner, for appellant.

Humphrey, Hines & Humphrey, for appellee.

SETTLE, J. This is an appeal from a judgment of the circuit court, entered upon a verdict in favor of appellee, which was

*For the authorities in this series on the question whether a presumption of negligence arises from the fact that an employee is injured, see foot-note appended to *Baltimore & O. R. Co. v. State* (Md.), 16 R. R. R. 399, 39 Am. & Eng. R. Cas., N. S., 399.

†For the authorities in this series on the question as to the degree of care required of a railroad, as an employer, see foot-notes appended to *Dean v. Oregon R. & Nav. Co.* (Wash.), 16 R. R. R. 237, 39 Am. & Eng. R. Cas., N. S., 237.

For the authorities in this series on the question as to the care required of a master in furnishing appliances, see foot-notes appended to *Smith v. Fordyce* (Mo.), 16 R. R. R. 378, 39 Am. & Eng. R. Cas., N. S., 378; *Randolph v. New York Cent., etc., R. Co.* (N. J.), 8 R. R. R. 637, 31 Am. & Eng. R. Cas., N. S., 637.

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returned by the jury in obedience to a peremptory instruction from the court. Appellant complains of the giving of the peremptory instruction and also of certain rulings of the trial judge relating to the exclusion of testimony.

The facts set forth in the petition as constituting appellant's cause of action were in substance that while in appellee's service as fireman on a freight train he attempted to replenish the fires of the engine with coal from the tender, and encountered a large lump of what he believed to be coal that blocked the opening to the tender, which he undertook to break with a pick in order to remove it and free the entrance, but upon striking it with the pick for that purpose a piece thereof struck him in the eye, causing him great suffering and finally the loss of the eye. It was also averred that the lump was of "coal, rock, and slate," unsuitable for use, which was at the time unknown to him, but was known, or by the exercise of ordinary care could have been known, to appellee, and that in furnishing him such material as fuel for the engine appellee was guilty of gross negligence which caused his injuries. The answer contained a general denial of the averments of the petition as to the nature and extent of appellant's injuries and the manner of his receiving same, specifically denied the acts of negligence attributed to appellee, and averred contributory negligence on the part of appellant. A reply was filed, traversing the plea of contributory negligence, and upon the issues thus formed the case went to trial.

Appellant was the only witness who testified as to the character and appearance of the lump in the attempt to break which his eye was destroyed. No other witness saw it. According to his testimony the lump looked like a piece of coal, and until it was broken no one could have told that it was anything but coal. He struck it several times with the pick in trying to break it, and one of the blows caused a piece of the coal or slack to fly up and strike him in the eye. He also testified that during his three years of service as fireman he often had to break coal for the firebox of the engine, and in fact a pick was kept on the engine for the use of the fireman in breaking coal. He further testified that when he entered the service of appellee as fireman it was using for its engines what was known as "Running Fork Coal," but about a year before the injury to his eye it commenced to use for that purpose "Mine Run Coal," both being unscreened coal, but that the Mine Run coal was of an inferior quality, in that it did not make steam as well as the Running Fork coal, of which he had some time before the accident complained to appellee. Appellant and his other witnesses, Davis, Wright, and Burke, testified that unscreened, or what is known as "Mine Run," coal is commonly used for firing engines. All concurred in the statement that the breaking of lumps of the best quality of coal, as well as that of the inferior quality, is usually attended with the flying upward and around

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of small pieces of the coal, which may, and frequently do, strike the person doing the breaking, and that appellant's injury was as liable to have occurred from the breaking of a large lump of good coal, as from the breaking of the lump of coal, slate, and rock in question. It was also shown by the testimony of the expert witnesses, Wright and Burke, that no coal is absolutely pure, but that it all contains foreign substances.

It was not averred in the petition that the Mine Run coal used by appellee at the time of the accident for its engines was unsafe or dangerous to the fireman or others handling it, or that it was more likely to cause such an accident as the one complained of than any other kind of coal. The complaint in the petition was its unsuitableness for the purpose for which it was used; that is to say, it was unsuitable, according to appellant's own testimony, because it did not make as much steam as some other coal, for upon that ground alone he had complained of it to the appellee. Appellant admitted, when testifying, that the slate or rock in the lump by which he was injured was so completely covered with a layer of coal on all sides that it was impossible for him to discover its presence until he tried to break it with the pick, several blows from which were given before he succeeded in reducing the lump to such a size as to enable him to get it from the opening through which coal is removed from the tender. It does not, however, appear from his testimony whether his eye was injured as a result of the first or a subsequent blow on the lump from the pick; but, in view of his statement that the presence of the slate in the lump was impossible of discovery before the application of the pick because of the surrounding layer of coal, we are unable to perceive any reasonable ground for his contention that its presence was known, or could by the exercise of ordinary care have been known, to appellee or any of its other servants. In loading the tender with coal, it was not thrown in by hand, but dumped therein from an overhanging chute at points along the railroad where the coal was kept in bulk to supply appellee's trains. Obviously there could have been no inspection of the coal by other servants of appellee, or by appellant in loading it on the tender. Mere proof of accident or injury to the servant does not raise the presumption of negligence on the part of the master. In order to recover damages against the master for the injury, the servant must produce some evidence conducing to show that it was caused by the negligence of the master or some one having authority to represent him. *Hughes v. Cincinnati, etc., Ry. Co.*, 91 Ky. 526, 16 S. W. 275; *Wintuska v. L. & N. R. R. Co.*, 20 S. W. 819, 14 Ky. Law Rep. 579.

The appellee was under no duty to furnish the best quality of coal for the engine of which appellant was fireman. At most its duty went no farther than to furnish coal that was reasonably safe for that purpose. It is not averred in this case that it did not do so; but, if it had been so charged, appellant's

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own testimony demonstrates that no diligence which could reasonably have been expected or required of appellee would have enabled it to discover that there was any defect in the lump from the breaking of which appellant received his injury, or danger to him in handling it. While this court has repeatedly announced and yet holds to the rule that it is the duty of the master to use ordinary care to provide the servant with reasonably safe tools, material, and place for the work required of him, it has never been carried to the extent of holding him liable for defects in tools, material, or place of work that no sort of inspection on his part could have discovered, for he is not bound to make the tools, material, or place of work absolutely safe, or to insure those engaged in his service against the ordinary risks incident to the nature of the employment. An instructive case in point is that of *L. & N. R. R. Co. v. Hinder*, 30 S. W. 309, 16 Ky. Law Rep. 841. The appellee, Hinder, was thrown from a hand car and injured by the breaking of a wooden handle attached to the iron lever that propelled the hand car. Appellee himself in his testimony said: "Owing to the fact that the crack was just at the edge of the iron socket in which the handle or lever was placed, and the fact that the handle or lever filled up the socket, no one could have detected the crack by merely looking at the handle and inspecting it." In view of the state of facts thus presented, the court, Judge Eastin writing, said: "It is not shown by the testimony that the appellant (railroad company), or any of its employees superior in rank to appellee, knew of any defect in this handle. * * * No other defect or supposed defect than this crack being testified to by any witness, and it being admitted that it could not have been discovered by looking at the handle and inspecting it, it seems to us that there is a total failure to establish a state of facts upon which appellant could be held liable. * * * The lower court erred, therefore, in refusing to instruct the jury peremptorily to find for defendant at the conclusion of plaintiff's testimony. * * *" *Brooks v. L. & N. R. R. Co.*, 71 S. W. 507, 24 Ky. Law Rep. 1319; *Wilson v. Chess & Wymond Co.*, 78 S. W. 453, 25 Ky. Law Rep. 1655; *Hooper v. Snead & Co. Iron Works*, 14 S. W. 542, 12 Ky. Law Rep. 483.

Appellant was an experienced fireman, and for a year previous to the accident resulting in the loss of his eye he had used the Mine Run coal. As fireman it was his duty, and often necessary, as he admitted, for him to break with a pick coal used in firing the engine. In doing so he had been, as he further admitted, struck several times in the face with flying particles of coal. Under the state of facts presented the defect in the material furnished by appellee as fuel for the engine, as well as the danger to appellant resulting from its use, was latent, so concealed, in fact, as to be beyond discovery by appellant or appellee. Therefore appellee could not by the exercise of ordinary or even a higher degree of care have prevented the injuries

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sustained by appellant. In handling the coal furnished for the use of the engine of which he was fireman, appellant only assumed an ordinary risk incident to the work in which he was engaged, and as the danger from his employment was not such as appellee by the use of ordinary care could have guarded against or prevented, no liability can be imposed on it for his injuries. *O'Bannon's Adm'r v. L. & N. R. R. Co.*, 6 S. W. 434, 9 Ky. Law Rep. 706; *Ky. Freestone Co. v. McGee*, 80 S. W. 1113, 25 Ky. Law Rep. 2211.

We think the trial court properly excluded the testimony of appellant and his witness, Davis, to the effect that they had made complaint to appellee's foreman of the coal which was being furnished for their engines. The testimony was irrelevant and incompetent, as their only ground of complaint to the foreman was that the Mine Run coal was bad for making steam, and not that it was unsafe or dangerous for a fireman to handle as appellant was handling it at the time of receiving his injuries. There was no issue as to whether the Mine Run coal made more or less steam than other coals. Consequently the testimony could not properly have been considered by the jury for any purpose.

Finding no error in the giving of the peremptory instruction by the lower court, the judgment is affirmed.

CAMPBELL v. RAILWAY TRANSFER CO. *et al.* (two cases).

(Supreme Court of Minnesota, July 7, 1905.)

[104 N. W. Rep. 547.]

Trial—Reception of Evidence.—It is fairly within the discretion of the trial court to allow the plaintiff to give all his evidence at one time, even though such evidence tends to show negligent custom, before it is shown by some direct evidence that the negligent act complained of was committed by defendant. In this case, held, that sufficient foundation for admission of such evidence was in fact subsequently laid.

Injury to Employee—Negligence—Question for Jury.—When it is shown that one defendant was in the habit, when unloading cars, of placing boards, used for the purpose of closing car doors, upon the top of such cars, and another defendant was in the habit of receiving such cars with admitted knowledge of such custom, the question of negligence as to both defendants was properly one of fact for the jury.

Same—Failure to Inspect.—Anterior negligence of one defendant does not shield another defendant from responsibility for its own negligence in its failure to inspect, so as to provide a reasonably safe place for its employees' labor.

Same—Contributory Negligence.*—Evidence examined, and held, that the plaintiff was not guilty of contributory negligence as a matter of law.

*See note, 12 Am. & Eng. R. Cas., N. S., 851 (verdicts for injuries to, or loss of, legs or feet); *Newcomb v. New York Cent., etc., R.*

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Negligence—Assumption of Risk.—The defense of assumption of risk is not available to a defendant not an employer of the person injured.

Master and Servant—Assumption of Risk.—Plaintiff, who, while coming down the side of one car, was injured by one end of a grain-door board resting against a cleat supporting the foot board on top of another car, and protruding over the side of that other car, which was standing on an adjoining track, did not, as a matter of law, assume such risk.

Action—Misjoinder of Causes—Waiver.—Where two causes of action are improperly united, the objection thereto is waived, under sections 5232, 5234, 5235, Gen. St. 1894, unless raised by answer or demurrer, and not by way of objection to the introduction of evidence.

Personal Injuries—Damages.*—An award of \$3,000 for a compound, comminuted fracture of the right leg, resulting in permanent injury, and for some damage to the left leg, whereby plaintiff, a switchman, earning \$3 a day, was confined to a hospital for several months, and was incapacitated from labor for about a year, is not excessive.

(Syllabus by the Court.)

Appeal from District Court, Hennepin County; Frank C. Brooks, Judge.

Action by Alexander Campbell against the Railway Transfer Company and the Northwestern Consolidated Milling Company. Verdict for plaintiff, and each defendant appeals from an order denying separate motions for judgment notwithstanding the verdict or for a new trial. Affirmed.

Albert E. Clarke, for appellant Railway Transfer Co.

Cobb & Wheelwright, for appellant Northwestern Consolidated Milling Co.

Humphrey Barton, for respondent.

Co. (Mo.), 13 R. R. R. 10, 36 Am. & Eng. R. Cas., N. S., 10 (\$10,000 not excessive, where there was chronic tendency to ulceration above where leg of man 62 years old had been amputated); Louisville & N. R. Co. v. Lowe (Ky.), 11 R. R. R. 434, 34 Am. & Eng. R. Cas., N. S., 434 (\$13,000 was grossly excessive for car inspector's loss of arm); Louisville Ry. Co. v. Meglemery (Ky.), 11 R. R. R. 665, 34 Am. & Eng. R. Cas., N. S., 665 (verdict for \$1,500 for injuries to leg and head of man 61 years old was not excessive, where he had not recovered eight months after the accident, and the injuries were such that it took him twice as long to go to and from his office as before the injury); Rueping v. Chicago & N. W. R. Co. (Wis.), 7 R. R. R. 15, 30 Am. & Eng. R. Cas., N. S., 15 (\$12,000 excessive verdict for fracture of leg of man forty-five years of age engaged in office work); Atchison, etc., Ry. Co. v. Sledge (Kan.), 10 R. R. R. 229, 33 Am. & Eng. R. Cas., N. S., 229 (\$7,000 was not excessive for loss of left arm above the elbow by man 23 years of age, who was earning from \$75 to \$80 per month); Morrison v. Northern Pac. Ry. Co. (Wash.), 10 R. R. R. 233, 33 Am. & Eng. R. Cas., N. S., 233 (\$12,500 was reduced to \$8,000 where there was only injury to the tissues, and a weakness of the attachment of the muscles of the pelvic bone); Newport News & O. P. Ry. & Electric Co. v. Bradford (Va.), 4 R. R. R. 106, 27 Am. & Eng. R. Cas., N. S., 106 (excessive verdict for injury to leg); Louisville & N. R. Co. v. Lowe (Ky.), 1 R. R. R. 363, 24 Am. & Eng. R. Cas., N. S., 363 (excessive verdict for loss of arm); Galveston, etc., R. Co. v. Abbey (Tex.), 4 R. R. R. 50, 27 Am.

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JAGGARD, J. This was an action to recover damages for personal injuries caused by negligence of both defendants. The defendant Railway Transfer Company operates what might be called a switching railroad among the flour mills at St. Anthony Falls, over which it transfers cars from other railroad companies to the mills, and from the mills to such railroad companies. The defendant milling company owns and operates a number of these mills. The transfer company delivered freight cars to the milling company at one of its mills. The latter then took charge of and unloaded the same. Afterwards the transfer company, by agreement with the milling company, took the cars away. In May, 1903, plaintiff entered the employ of the transfer company. On April 5, 1904, the transfer company delivered to the milling company several cars loaded with grain. The doors of the car doing the damage here were closed with boards. On April 6, 1904, the plaintiff, while coming down on a ladder from the top of a Pere Marquette freight car, was caught between a board projecting from the top of the other car, known as "Soo Car 3782," on an adjacent track, and the car from which he was descending. While defendants united against the plaintiff, their defenses were different, and each claimed that, if any liability existed at all, such liability was that of the other defendant only. The jury awarded a verdict of \$3,000 against both defendants. The case comes to this court upon separate appeals from an order denying each defendant's separate motion for judgment notwithstanding the verdict, or

& Eng. R. Cas., N. S., 50 (sixteen thousand dollars not excessive where engineer thirty-five years old sustained loss of foot); *Berry v. Lake Erie & W. R. Co.* (U. S.), 3 Am. & Eng. R. Cas., N. S., 654 (measure of damages for loss of leg by infant seven years old); *Elliott v. Newport St. R. Co.* (R. I.), 2 Am. & Eng. R. Cas., N. S., 388 (loss of portion of foot); *Yerkes v. Northern Pac. Ry. Co.* (Wis.), 23 Am. & Eng. R. Cas., N. S., 642 (loss of leg); *St. Joseph & G. I. R. Co. v. Hedge* (Neb.), 2 Am. & Eng. R. Cas., N. S., 387 (permanent injury to ankle); *Texas & P. R. Co. v. Johnson* (Tex. Civ. App.), 3 Am. & Eng. R. Cas., N. S., 439 (paralysis of one arm and loss of leg); *Wimber v. Iowa Cent. Ry. Co.* (Iowa), 23 Am. & Eng. R. Cas., N. S., 476 (verdict for \$14,500 for loss of brakeman's leg reduced to \$8,000); *Wood v. Louisville & N. R. Co.* (Tenn.), 11 Am. & Eng. R. Cas., N. S., 525 (\$8,000 not excessive damages for loss of foot and toes of other foot); *Chitty v. St. Louis, I. M. & S. Ry. Co.* (Mo.), 23 Am. & Eng. R. Cas., N. S., 829; *Kalfur v. Broadway F. & M. Ave. R. Co.* (N. Y.), 12 Am. & Eng. R. Cas., N. S., 850 (\$1600 for loss of leg above knee, by boy 18 months of age, and consequent pain and suffering will not be held excessive on review by supreme court); *Illinois Cent. R. Co. v. Stewart* (Ky.), 21 Am. & Eng. R. Cas., N. S., 874 (verdict for \$15,000 for loss of both legs will not be set aside as excessive where punitive damages were authorized); *Jackson v. St. Louis, S. W. Ry. Co.* (La.), 18 Am. & Eng. R. Cas., N. S., 444 (\$4,000 held not excessive for loss of arm of boy 14 years old); *St. Louis, etc., Ry. Co. v. Warren* (Ark.), 13 Am. & Eng. R. Cas., N. S., 729 (where plaintiff, a boy 2½ years of age, lost both hands, and one leg and foot were so injured as to render him permanently lame, verdict for \$40,000 was held so excessive as to appear to be the result of prejudice and passion on the part of the jury).

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for a new trial. The appeals of both defendants will be treated, as far as this opinion is concerned, as one.

1. The defendant milling company contends that reversible error was committed by the court in receiving evidence that on other occasions cars came from the mills with boards on top of them, under objections specifically pointing out and fully apprising the court of the ground of objection—that negligent habit could not be proven until it be shown by some evidence that the particular board complained of was placed on the car causing the damage by the defendant milling company. Elliott on Ev., § 173; *Shaber v. Ry. Co.*, 28 Minn. 108, 9 N. W. 575; *Davidson v. Ry. Co.*, 34 Minn. 51, 24 N. W. 324; *Pittsburg Ry. Co. v. McNeil* (Ind. App.) 66 N. E. 777; *Dunnell's Minn. Trialbook*, § 847; *Newstrom v. Ry. Co.*, 61 Minn. 78, 63 N. W. 253; *Fonda v. Ry. Co.*, 71 Minn. 438, 74 N. W. 166, 70 Am. St. Rep. 341; *Kaillen v. N. W. Bedding Co.*, 46 Minn. 187, 48 N. W. 779. The memorandum of the trial court on this point justifies the reception of the evidence on two grounds, namely: (1) Because the testimony was admissible as against the transfer company, and, if admissible upon any ground or against any party, it must be received, and, if it be ineffectual or inadmissible for any specific purpose or against any particular party, the court should, upon request, so charge the jury; and (2) because the objection was addressed to the order of proof. We are of opinion that the latter ground, at least, was well taken. It was fairly within the discretion of the trial court to allow, as it did, the plaintiff to give at one time all his testimony, including that pertaining to this custom, and, in case no foundation for it was subsequently laid, to strike it out on the court's own motion. In point of fact, however, direct testimony was subsequently produced. It was shown that no board was on the car when it was delivered to the milling company on the morning of April 5th; that the car was taken out about 2 o'clock on the morning of April 6th to the yard, to be distributed to the transfer company; that certain boards were taken out of the car by the milling company when the car was unloaded; that afterwards the board was on the car. A witness, who loaded the car in North Dakota, testified that the boards there used by him in closing the car-door space were of a kind of hardwood peculiar to that part of the country, and that the board which injured the plaintiff was of this specific type. While it is true that the servants of the milling company swore that they did not put this board on the top of the car, the testimony referred to was sufficient to have justified the introduction of evidence of the custom, if it had preceded in point of time the reception of proof of negligent custom. The court was therefore within the exercise of its discretion as to order of proof. *Gillette on Indirect Ev.*, § 68.

2. The negligence of the milling company was sufficiently shown to have been a question of fact, to be determined by the

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jury, viz., whether or not its employees placed the board on the Soo car in question in pursuance of a demonstrated custom. The negligence of the transfer company was also for the jury. Its duties as to inspection in this instance have not the same basis as if the car had come to it from a connecting carrier. Its car went to the milling company in a safe condition, and returned in a dangerous condition. The transfer company was not directly responsible for the conduct of the servants of the milling company, to whom it stood in no contractual relation, and over whom it had no control. It insists that it had no notice, actual or constructive, of the presence of the board on the top of the car. Sporadic or isolated instances of placing a board on the top of a car might well be held not to impose the duty of inspection in that regard. In this case, however, there was a long-established, easily observed, and persistent custom to that effect on the part of the milling company. The transfer company had such a direct knowledge that it complained, and demanded the cessation of that habit. In the conflict of interests between the two defendants, the milling company insisted that the presence of the board on the top of the car, with which we are here concerned, was due to the custom of the transfer company's employees to put these boards on the tops of cars, and to then throw them off at stated places for subsequent personal use or sale; and the transfer company contended that "the uncontradicted evidence shows" that the milling company's servants continued their dangerous custom. On either theory the negligence of the transfer company would be for the jury. There was in fact sufficient evidence of the practice on the part of the other defendant, though somewhat abated in extent, to create a question for the jury as to constructive notice, and negligence by the transfer company with respect to such custom, in performance of its duty to provide its servant, this plaintiff, with a reasonably safe place in which to do his work, to not expose him to unknown and unnecessary hazard, and thereunto to make reasonable inspection. It failed in the performance of this duty, according to the finding of the jury.

There is no merit in the transfer company's contention that, if any one is liable, it must be the milling company only, because its negligence was the proximate cause of the damage. In point of fact, that negligence was anterior, but the responsibility as a legal cause in such a case does not depend upon the sequence in time of the wrong charged. *Mo. Pac. Ry. Co. v. Moseley*, 57 Fed. 921, 6 C. C. A. 641. It is not essential that a juridical cause be a sole cause. *Lake Shore, etc., Ry. Co. v. McIntosh* (Ind. Sup.) 38 N. E. 476; *McClellan v. St. Paul, M. & M. Ry. Co.* (Minn.) 59 N. W. 978. When damage complained of is the result of the wrong of the defendant and a third person, and could not have been produced in the absence of either, the defendant's wrong is, in law, a proximate cause of the injury. *McMahon v. Davidson*, 12 Minn. 357 (Gil. 232);

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Campbell v. City of Stillwater, 32 Minn. 310, 20 N. W. 320, 50 Am. Rep. 567; *Johnson v. N. W. Tel. Exch. Co.*, 48 Minn. 433, 51 N. W. 225; *Grand Trunk Ry. Co. v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493, 27 L. Ed. 266. Accordingly the anterior negligence of the milling company in putting the board on the car did not, in view of the persistence of the dangerous custom, shield the railway company from responsibility for its failure to inspect that car, and to provide a reasonably safe place for its employees' labor. *Teal v. American Min. Co.*, 84 Minn. 320, 87 N. W. 837; *Moon v. N. P. Ry. Co.*, 46 Minn. 106, 48 N. W. 679, 24 Am. St. Rep. 194; *Heron v. Railway Co.*, 68 Minn. 542, 71 N. W. 706. And see 34 Cent. Dig. cols. 672 to 676, inclusive.

3. The plaintiff was not guilty of contributory negligence as a matter of law. It was not his duty, as the milling company in effect insists, to examine the Soo car, and see that it did not have boards on it, while he was working with the crew of men which pulled out from the mill the string of eight or ten cars, of which the Soo car doing the damage was one. The master, and not the servant, was required by law to make the inspection. His work did not require him to, and he did not, according to the evidence, pass over this particular car. Nor was he, as a matter of law, guilty of contributory negligence in descending from the side of the moving car near the car doing damage, as the transfer company insists. He was not bound to wait until the car stopped. To have done so might have exposed him to danger when the car on which he was riding bumped into another car. He was not negligent in getting off of a moving car on the side he did, to enable him to go back more quickly to the train and get another car, so long as the cause of the injury was not the rapidity of the motion. In doing what he did he was serving his master to the best of his ability, and in the usual and customary manner, which would not have been dangerous if his employer had not been negligent. The defendants accordingly have not conclusively shown negligence on his part with reference to the producing cause of the injury. *Flanders v. C., St. P., M. & O. Ry. Co.*, 51 Minn. 193, 53 N. W. 544; *Olson v. Schultz*, 67 Minn. 494, 70 N. W. 779, 36 L. R. A. 790, 64 Am. St. Rep. 437; *Curtis v. Ry. Co.*, 95 Wis. 460, 70 N. W. 665; *Phillips v. Ry. Co.*, 64 Wis. 475, 25 N. W. 544; *Ry. Co. v. Tynan*, 119 Fed. 288, 56 C. C. A. 192; *Railway Co. v. Mansberger*, 65 Fed. 196, 12 C. C. A. 574.

4. The plaintiff did not assume the risk of the projecting board. The basis of the contention of the defendant transfer company, to which only, as his employer, this defense is available, was that defendant was charged with no more knowledge than the plaintiff as to the danger from the projecting board; that, if either should have known of the danger, the plaintiff, whose knowledge of the custom is fully shown, should also have known it, and therefore he assumed it. It is a well-settled rule in this state, however, "that the master and servant do not

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stand at all upon the same footing in these matters. It is the master's duty to supply safe instrumentalities for the use of his servants. He is bound to exercise reasonable diligence in informing himself as to whether his machinery is safe, whereas the servant, in the absence of notice to the contrary, or something to put him on inquiry, has a right to assume that his master has done his duty, and to rely on his superior judgment.

* * * He is not necessarily bound to know as much as his master ought to know as to what is or what is not safe. Again, it is one thing to be aware that machinery is defective or in a particular condition, and another to know or appreciate the risk resulting therefrom. * * * The mere fact that a servant knows the defects does not necessarily charge him with contributory negligence, or the assumption of risks growing out of those defects. The question is, did he know, or ought he, in the exercise of ordinary common sense and prudence, to have known, the risks to which the condition of the instrumentalities exposed him." *Wuotilla v. Duluth Lbr. Co.*, 37 Minn. 153, 155, 33 N. W. 551, 5 Am. St. Rep. 832; *Christianson v. Northwestern Compo-Board Co.*, 83 Minn. 25, 85 N. W. 826, 85 Am. St. Rep. 440; *Snedda v. Libera*, 65 Minn. 337, 68 N. W. 36; *Newhart v. St. Paul Ry. Co.*, 51 Minn. 42, 52 N. W. 983; *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573.

The plaintiff was injured, not while passing over the way on the top of the car, provided for the use of brakemen, which risk it might have been held he would have undertaken, but by a board protruding over the side of the car, which by the same reasoning he could not be held to have assumed. He was not, as a matter of law, bound either to anticipate that, or to investigate whether, he might, in descending from the car, be exposed to danger from the Pere Marquette car which would happen to be on the next adjoining track, arising from the facts that one end of a grain-door board would rest against a cleat supporting the way on top of the car, and that the other end would protrude over the side of that car. It would be carrying the doctrine unreasonably far to conclusively hold that he should have foreseen this possibility or have appreciated the risk. *Martin v. North Star Iron Works*, 31 Minn. 407, 18 N. W. 109; *Choctaw, etc., R. Co. v. McDade* (U. S.) 24 Sup. Ct. 24, 48 L. Ed. 96; *Libby, McNeill & Libby v. Scherman* (Ill.) 34 N. E. 801, 37 Am. St. Rep. 191. This is especially true in view of the fact that plaintiff had not on that trip passed over the car on which the board protruded. He had not seen it, and knew nothing about it. He was there at night, when it was dark. The accident was therefore not the result of inattention to a known peril on the part of the person injured, as in *Clark v. St. Paul, etc., Ry. Co.*, 28 Minn. 128, 9 N. W. 581. Moreover, after the complaint by the transfer company the milling company forbade the continuance of the custom, and employed a man to carry away such boards during the day, although the

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unloading continued all night. The accident in question, it must be remembered, occurred in the nighttime. The effect of this order was in some measure to abate the danger. The plaintiff after the change did little work for the transfer company; was sick and not at work for some time previous to the accident. These circumstances constitute additional reasons for refusing to hold that as a matter of law he appreciated the danger and assumed the risk of the protruding board.

5. The transfer company also insists that two causes of action were improperly united. If this objection had been raised by way of answer or demurrer, this court would have been called upon to determine the question. Having raised the question for the first time at trial, and upon the admission of evidence, the defendant has waived it. Sections 5232, 5234, 5235, Gen. St. 1894; *Pope v. Waugh* (Minn.) 103 N. W. 500.

6. The milling company only, and not the transfer company, raised the objection that the award of damages by the jury was excessive. The difficulties in practice as between the defendants, which might arise if the objection were sustained, constitute no sufficient reason for refusing to reduce or to set aside the verdict if the milling company be entitled to such relief. In the assessment of damages in cases of this character, no fixed rule can be laid down. Previous decisions of courts upon similar circumstances should be given due weight, *inter alia*, because counsel have a right to place some reliance upon them as guides to the amount proper in connection with negotiations for settlement. But in the nature of things the award in each case must be determined primarily by its own pertinent evidence. The instant case, it is urged, is controlled by *Slette v. G. N. Ry. Co.*, 53 Minn. 341, 55 N. W. 137. There a verdict of \$4,100 for a transverse fracture of a thigh bone was reduced to \$2,100. In the case at bar the jury awarded \$3,000 for a compound, comminuted fracture of the right leg, from which, because of skillful surgery, there was an excellent recovery, but which resulted in permanent injury. But here the left leg was also hurt, although after its consequent swelling had been lanced the injury does not seem to have been serious. Slette was a sectionman, earning \$35 per month. This plaintiff was a switchman, acting sometimes as a foreman, and receiving in the former capacity \$3, and in the latter \$3.30, per day of 10 hours. Plaintiff was confined to a hospital from April 6th to July 3d. At the time of trial, about a year after the accident, he was incapacitated from work. In accordance with the spirit and letter of the Slette Case, and of the authorities generally, and in accordance with reason, it must be held that the verdict was not excessive.

We have examined and considered other assignments of error, and do not find them sufficient to justify reversal of order of the trial court.

The orders appealed from are affirmed.

CINCINNATI, N. O. & T. P. RY. CO. *v.* CURD.

(Court of Appeals of Kentucky, Oct. 12, 1905.)

[89 S. W. Rep. 140.]

Master and Servant—Fellow Servants—Vice Principal.*—A conductor in charge of a freight train backed his train onto a siding with such force as to throw a heavy casting from a car, which was standing on the siding and which was struck by the freight train, onto the main track, where it was struck by a passenger train, which it wrecked, thereby injuring the fireman of such passenger train. A rule of the railroad required employees in charge of trains to promptly report to the superintendent any incident involving the obstructions of the road, to repair damages and take entire charge of necessary work, and to first protect the train with proper danger signals, and take every precaution to prevent further accident. Held, that under the laws of Tennessee the crews of the freight and passenger trains were fellow servants up to the time when the casting was thrown upon the main track, but from that time until the time when the passenger train was wrecked the conductor of the freight train was, by virtue of the railroad's rule, a vice principal, whose duty it was, as a representative of the railroad, to remove the obstruction from the main track and to warn the approaching passenger train for its protection.

Same—Proximate Cause.—The negligence of the conductor, when acting as vice principal, was the proximate cause of the injury to the fireman.

Removal of Causes—Unauthorized Removal—Effect of Filing Record.—Where the state court refused to remove a cause to the federal court, defendant's act in having the record copied and filing the same with the clerk of the federal court did not carry the case into the federal court in such sense as to render it a pending action there.

Master and Servant—Injuries to Servant—Evidence—Rules of Master.—In an action against a railroad for injuries to a fireman on a passenger locomotive, caused by the negligence of a freight conductor in recklessly backing his train onto a siding and causing a heavy casting to be thrown onto the main track, where it was struck by the passenger locomotive, a rule of the railroad requiring employees in charge of trains to report obstructions of the road to the superintendent, to repair damages, to take charge of necessary work, and to protect the train and prevent further accident, was properly admitted in evidence.

Damages—Excessiveness—Personal Injuries.—A railroad fireman, 33 years of age, and enjoying robust health, was injured in a wreck. He was rendered unconscious for 10 hours, his head was split open, his right arm was broken, his back was burned in four places, his left leg was punctured, and the muscles thereof torn. There were further injuries to his ears, nose, and face. He lost the use of his right arm, his spine was permanently injured, he was unable to turn his head

*For the authorities in this series on the question whether trainmen of different trains are fellow servants, see foot-notes appended to *Morrison v. Northern Pac. Ry. Co.* (Wash.), 10 R. R. R. 233, 33 Am. & Eng. R. Cas., N. S., 233.

For the authorities in this series on the question whether an employee to whom the duty of seeing that work places and appliances are kept in a safe condition had been delegated is a fellow servant of an employee injured by reason of his negligence in this respect, see foot-note appended to *Mullin v. Northern Pac. Ry. Co.* (Wash.), 16 R. R. R. 234, 39 Am. & Eng. R. Cas., N. S., 234.

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independently of his body, was unable to control the action of his kidneys, was reduced in weight 30 pounds, and was rendered unable to perform manual labor. Held, that a verdict for \$11,000 was not excessive.

Trial — Instructions — Refusal of Requests — Instructions Already Given.—Requested instructions are properly refused, where all that is proper in them is embodied in instructions given.

Appeal from Circuit Court, Mercer County.

“Not to be officially reported.”

Action by Owen Curd against the Cincinnati, New Orleans & Texas Pacific Railway Company and others. From a judgment for plaintiff, defendant railway company appeals. Affirmed.

E. H. Gaither and *Galvin & Galvin*, for appellant.

Robt. Harding, Denton & Robinson, E. M. Hardin, and Greene & Van Winkle, for appellee.

NUNN, J. In September, 1903, the appellee, Owen Curd, filed his petition against appellant and the trustees of the Cincinnati Southern Railway Company, and against Eli J. Shipp, conductor, and William Crissman, engineer, on a freight train, for damages for personal injuries, alleging joint gross negligence of the defendants. Previous to the filing of this suit the appellee had filed a suit for the same cause of action in almost the same words, making the same parties defendants with the exception of Shipp. To this first petition the appellant and its codefendants, trustees of the Cincinnati Southern Railway, filed a petition for removal to the federal court as non-resident defendants, executing bond with sufficient surety, approved by the court. The court overruled the petition for removal; but, notwithstanding this action of the court, the record, properly certified, was carried by the appellant to the federal court, and was at the time of the filing of this petition, in September, 1903, pending in the federal court, and is still pending. The petition of the state court, however, was, after the filing of the petition in September, 1903, dismissed without prejudice. A petition for removal of the second suit, with bond as required by law, was filed by the appellant and the trustees of the Cincinnati Southern Railway, but was overruled. Demurrers to the petition being overruled, each of the defendants answered separately. The answer of the appellant pleaded, first, to the jurisdiction of the court; second, a traverse of the plaintiff's petition; third, that the injury occurred wholly within the state of Tennessee, and that the incident was caused by the acts of the fellow servants of the plaintiff under the laws of the state of Tennessee; fourth, that there was then pending in the United States court for the Eastern district of Kentucky, between the appellee and the appellant, an action involving the same subject-matter involved in this action. The appellee filed a reply, traversing the affirmative matter in the answer. The cause was tried at the February, 1904, term, and resulted in a verdict of \$11,000 against the appellant and Shipp and Criss-

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man. Motion and grounds for a new trial were overruled, and the appellant alone appeals.

The appellant relied upon many grounds for a new trial in the court below, but insists upon the following grounds only for a reversal in this court: First, that by the laws of Tennessee Shipp and Crissman, whose negligence it is contended caused the accident, were the fellow servants of the appellee, Owen Curd, and that the appellant was not responsible to the appellee for the acts of the fellow servants; second, that under the proof the appellant was entitled to a peremptory instruction, the negligent act charged and the resulting injury being too remote to hold appellant liable therefor; third, that, the same action being then pending in the United States court, the Mercer circuit court had no jurisdiction of the action; fourth, that the court admitted improper testimony; fifth, the verdict is excessive. The facts of the case are about as follows: The appellee was a fireman upon the appellant's road, and at the time of the injury complained of in his petition was firing upon a locomotive attached to a passenger train. His run was from Somerset, Ky., to Chattanooga, Tenn. There is on the road over which he passed, in Tennessee, a small station known as Sunbright, and at the time of the occurrence there had been left standing upon the siding at this station a number of freight cars. Upon one of these cars, a flat car, there was a heavy casting, weighing about 3,000 pounds. The train upon which Curd was firing was due at Sunbright a little before 5 o'clock in the morning, which at that season of the year—December—was before daylight. His train was headed south. A freight train, the same upon which Shipp and Crissman were the conductor and engineer, was going north, and took the siding on the time of the passenger at this station. This siding was about 800 yards long; the north end of it being at the depot. Instead of entering the siding from the south end, they passed up the main track and backed in on the siding, and ran in with such reckless speed that this freight train struck the standing cars on the siding with such force as to derail one of the loaded cars in the freight train and break this flat car, on which was located the casting, throwing it off about 12 feet, onto or near the main track. About 15 or 20 minutes after this the passenger train, upon which appellee was situated, came along, running at the rate of about 50 or 60 miles an hour. The locomotive struck the casting and wrecked the passenger train, and appellee was thrown from the locomotive and severely injured. The wrecking of this train was due alone to the negligence of the appellant company and the conductor and engineer of the company's north-bound freight train, who caused this obstruction of the main track, and suffered and permitted it to remain obstructed with this large piece of machinery without giving any notice or warning to the fast south-bound passenger train, which they knew was due to come south over the main track at the time

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and before they obstructed this track with this machinery. It is conceded that under the law of the state of Kentucky, under the facts established, the appellant would be liable to the appellee for his injury. As stated, the appellant pleaded in the lower court that the common law of the state of Tennessee, as construed by the courts of that state, governed and controlled this case. Admitting, for the purposes of this action, that this is true, we will proceed upon this assumption.

Appellant's contention is that appellee's injuries were received by reason of the wrongful acts and negligence of the crew in charge of the freight train, and that every member of that crew, including the conductor, was the fellow servant of the appellee, and for that reason the company, the master, is not responsible in damages, and that, when appellee undertook to serve the appellant as employee, he assumed all such risks. To substantiate this claim, the appellant took the deposition of two eminent lawyers of the state of Tennessee and put to each of them a hypothetical question. In answer to this, they each stated in substance that they were clearly of the opinion that the appellee and the other members of his own crew, and those of the freight crew, were all fellow servants, and that the appellant was not responsible to the appellee for his injuries. They both, however, stated that the courts of Tennessee had made some exceptions to the common-law rule. On the cross-examination some of these exceptions were elicited. The following question was put to one of the witnesses, Judge Estill: "Under the state of facts as given in the hypothetical question of Col. Gaither [attorney for appellant] in your direct examination, I will ask you if there is any member of either of the crews who would not be a fellow servant of the fireman on the passenger train." His answer was as follows: "The members of both crews were all fellow servants, unless it was the duty of some one of the crew on one of the trains, or both of them, to see that the track was kept clear; that is to say, unless it should appear it was the duty of some one or more of the members of these crews to look after the condition of the track, and to see that it was kept clear of obstructions. In the performance of a number of duties devolving on the conductor of the train, as, for instance, the taking of train orders and looking to the movement of his trains, so as to prevent collisions with other trains, the conductor of either a passenger or a freight train stands in the relation of vice principal to brakeman and firemen; but the mere fact that an injury results from the negligence of the conductor does not necessarily charge the railroad company, unless the conductor stood in the place of the railroad company with reference to the particular matter. In other words, the mere fact that an injury results from the negligence of the servant superior in rank to the injured servant, does not render the master liable; but, in order to charge the master with such negligence, the superior servant must so far stand in the place

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of the master as to be charged in the particular matter with the performance of the duty toward the inferior servant, which under the law the master owes that servant. If it is no part of the duty of the conductor, or any other member of either crew, to look after the condition of the railroad track, then the mere fact that the conductor or other member of the crew that stood in the relation of vice principal may have seen the obstruction on the track and did not remove it would be regarded as the personal, and not the official, negligence of such employee. This distinction is very clearly pointed out in the case of *Allen v. Goodwin* [21 S. W. 760], before referred to. Of course, if it should be made to appear by proof that it was the duty of any member of either crew, other than the injured fireman, to look after the condition of the track, and they negligently failed to do so, this would be official negligence of the vice principal, and the railroad company would be responsible. In other words, the doctrine of respondeat would apply." This question was also asked him: "Under the hypothetical question stated by Col. Gaither, if the company delegated to the engineer or the conductor the duty to keep the track unobstructed, if any obstruction occurred, would not the company be responsible, on the ground that the engineer or conductor was vice principal?" He answered as follows: "If the company instructed any employee, who was a member of either of these crews, to keep the track clear of obstructions, and the employee so instructed negligently failed to remove an obstruction from the track, and the injured fireman was himself, at the time he received the injury, in the exercise of a reasonable care and prudence, he would be entitled to recover. In the case you state in your question, coupled with the hypothetical question stated in the direct examination, the engineer or conductor would occupy the position of a vice principal; that is to say, he would be in the performance of a duty which the master owed the servant, and if he was negligent in its performance the doctrine of respondeat superior would apply."

Appellee introduced as evidence a rule taken from one of appellant's books of rules given to those of its employees in charge of trains. This rule is as follows: "Should an incident occur involving the loss of life, serious injury of person, damage to property, or the obstruction of the road, or whenever the road is found impassable or unsafe from any cause, or whenever there is any unusual delay, report to the superintendent by telegraph as soon as possible, giving all information necessary to a clear understanding of the case and what help is required. Take prompt and efficient measures to prevent excitement and needless alarm, and to repair damages and forward passengers to their destination with the least possible delay. In the absence of the superintendent or other officer, take entire charge of all work necessary to be done and of all employees that can be spared to render assistance. First protect the train with the

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proper danger signals, be sure that every possible precaution is taken to prevent further accident, and get word as quickly as possible to the superintendent or heads of departments." This was under the head of rules for conductors. We are of the opinion that, under the laws of the state of Tennessee as proven, the crews of both of these trains were fellow servants up to the moment when the freight train was wrecked and this heavy iron casting was thrown upon the main track. But from that moment to the time when the passenger train was wrecked, which was about 15 or 20 minutes after, Shipp, the conductor of the freight train, by reason of the rule referred to, was the vice principal, and stood in the place of the appellant, and it was made his duty to command the services of all the other members of the crew to ascertain the extent of the injury to his train, the standing cars upon the side track, and the obstructions, if any, placed upon the main track, and to remove same; but the first thing he should have done, under the rules, was to send out a flagman to signal the oncoming passenger train for its protection. And it appears that the conductor did not perform, or attempt to perform, any of these duties. Under this rule it was made the duty of the conductor of this freight train, under the circumstances proven, to look after the protection of the oncoming passenger train and the protection of the track; and Judge Estill testified that if, under such circumstances, he negligently failed to do so, this would be an official negligence of the vice principal, and the railroad would be responsible. In other words, the doctrine of respondeat superior would apply.

It is contended by counsel for appellant that the conductor did not know of this heavy iron being thrown upon the track, the breaking of the flat car, and the derailing of the loaded car in his train. It is true the conductor testified that he thought the collision was a very light one, and that he did not know of any of these things, and that the collision was so light that he had no reason to suspect such results. But little credence can be given this statement, when the results of the collision are considered.

As to the second proposition of appellant, we do not see how the negligent act charged and the resulting injury were too remote to hold appellant liable. The negligent act of the conductor, when acting as the vice principal, was the direct cause of his injury.

As to the third proposition, we are of the opinion, from the facts as they appear in this record, that the appellee never had any action pending in the United States court. The lower court refused to remove the cause to that court. Having the record copied and filing same with the clerk of the United States court was appellant's own act, and not the act of the appellee in any sense, and he never undertook to prosecute the action in the United States court, nor did he become a party thereto. His action remained in the state court.

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The appellant complains that the court admitted improper and incompetent testimony in admitting the rule hereinbefore copied as evidence. It does not present any authority showing that it was incompetent, and we are of the opinion that it was competent. This court has in many cases so decided.

The fifth, and last, ground is that the verdict is excessive. The proof shows that appellee was unconscious for 10 hours after the wreck; his head was split open to the bone; his right arm was broken in the joint where the arm goes into the socket; there were four places on his back which were burned by the rods of the engine; his left leg was punctured, the muscles being torn for 10 inches in length; one of his ears was torn half off; his nose was cut open; cinders were ground into his forehead and face, and are still under the skin, clearly to be seen, giving it a bluish appearance; he lost the use of his right arm, and it had dropped an inch and a half from the socket at the shoulder; his spine is permanently injured, causing a condition like creeping paralysis; he is unable to turn his head without at the same time turning his whole body; he is unable to control the action of his kidneys; he has been reduced in weight 30 pounds, and is a wreck of his former physical manhood, and unable to perform any manual labor. It is true the testimony of the appellant tended to contradict the extent and permanency of his injuries, but the jury had the appellee and all the witnesses before them; and, if the appellee was injured to the extent testified to by himself and his witnesses, the verdict of the jury was not too large, considering the fact that at the time he was injured he was only 33 years old, and in sound, robust health.

The instructions given by the court were not objected or excepted to by either party, and in fact there is no serious complaint made of them. The court properly refused the instructions offered by the appellant, as all that was proper in them was embodied in the instructions given.

For these reasons, the judgment of the lower court is affirmed.

MCGREGOR *v.* PENNSYLVANIA R. CO.

(Supreme Court of Pennsylvania, June 22, 1905.)

[61 Atl. Rep. 1017.]

Master and Servant—Safety Appliances.*—A railroad company is not negligent in failing to provide automatic signals in its switchyard, where it does not appear that the signal system provided and the other switching appliances are not the same as those ordinarily used by railroads, or that they are dangerous.

Appeal from Court of Common Pleas, Huntingdon County.

Action by Laura McGregor against the Pennsylvania Railroad Company. From a verdict on judgment for plaintiff, defendant appeals. Reversed.

Trespass to recover damages for death of plaintiff's husband. At the trial it appeared that on November 8, 1899, plaintiff's husband, H. R. McGregor, a freight brakeman, was killed in the defendant's yards in the city of Altoona. The accident was the result of a collision between a freight car and the bumper of an engine. The deceased was on the freight car at the time. It was claimed that the defendant was negligent in not providing an automatic system of signals. Other facts appear by the opinion of the Supreme Court. Verdict and judgment for plaintiff for \$4,000. Defendant appealed.

Argued before DEAN, BROWN, MESTREZAT, POTTER, and ELKIN, JJ.

John D. Dorris, for appellant.

W. C. Fletcher and *W. M. Henderson*, for appellee.

ELKIN, J. No matter how distressing the accident, or unfortunate the circumstances surrounding the death of the decedent, who was the husband of the plaintiff and the employee of the appellant, there can be no recovery of damages unless the death was the result of negligence on the part of the defendant company. The learned trial judge entertained some doubt about the liability of the defendant in this action, which is evidenced by the reservation of the following questions, with the right to enter judgment non obstante veredicto: "First. Is there any evidence of negligence on the part of the defendant

*For the authorities in this series on the question of the care due from railroad companies, as employers, in furnishing appliances, see foot-notes appended to *Smith v. Fordyce* (Mo.), 16 R. R. R. 378, 39 Am. & Eng. R. Cas., N. S., 378.

For the authorities in this series on the question of the care required of a railroad company in furnishing an employee a safe place to work, see *Southern Pac. Co. v. Gloyd* (C. C. A.), 16 R. R. R. 408, 39 Am. & Eng. R. Cas., N. S., 408; foot-notes appended to *Dean v. Oregon R. & Nav. Co.* (Wash.), 16 R. R. R. 237, 39 Am. & Eng. R. Cas., N. S., 237.

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company which would warrant the judgment in favor of the plaintiff? Second. Under the undisputed evidence, was not the negligence of either Mr. Allaway, the switchman, or Mr. Chase, the engineer, who were fellow servants of the decedent, proximately the cause of the accident? Third. Was not the cause of the accident one of the risks the decedent assumed when he engaged as brakeman dropping down trains through the yard of the Pennsylvania Railroad in Altoona?" In passing upon the reserved questions, the trial judge, among other things, said: "But, even assuming that said engineer and said switchman, who were fellow employees of said decedent brakeman, were guilty of negligence, was it not a question for the jury as to whether there was not negligence on the part of the railroad company?"

After a careful consideration of the case and an exhaustive examination of the testimony, we are of opinion that there was no evidence of negligence by the defendant, and that the learned court erred in not so ruling. It is suggested by the court and by the learned counsel for appellee that automatic signals should have been provided; but the evidence does not justify such a conclusion. There is nothing in the testimony to show that the system of signals provided by the railroad company, and the appliances for the switching of cars and making up of trains in the yard, were not such as were in ordinary use by railroads for such purposes, or that they were dangerous or unsafe. Something has been said about the failure of the defendant company to establish a system of rules for employees in and about the yard. The testimony in this respect is meager and unsatisfactory, although one of the witnesses said there was a book of rules regulating these matters. It is clear, however, that the testimony produced by the plaintiff was not sufficient to charge the defendant with negligence in not providing proper rules. There was no evidence in the case, either as to rules, appliances, or signals, that would warrant a jury in finding as a fact that the defendant company was negligent in any or all of these respects. It follows, therefore, that there was error in submitting the case to the jury, or, after submission, in not entering judgment non obstante veredicto in favor of the defendant. To permit a recovery in this case would impose upon the defendant a standard of care and responsibility beyond that recognized in any of our cases. As was said by Mr. Justice Green in *Southside Passenger Ry. Co. v. Trich*, 117 Pa. 390, 11 Atl. 627, 2 Am. St. Rep. 672: "To impose such a standard of care as requires, in the ordinary affairs of life, precaution on the part of individuals against all the possibilities which may occur, is establishing a degree of responsibility quite beyond any legal limitations which have yet been declared." The appellee having failed to show by testimony negligence on the part of the defendant such as would make it liable in damages, there can be no recovery in this case. This view of the law being

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fatal to the claim of the plaintiff, it is unnecessary to discuss the question of the decedent's contributory negligence, or whether the accident was the result of the negligence of fellow servants.

Judgment reversed.

COLLINS v. LOUISVILLE & N. R. Co.

(Court of Appeals of Kentucky, May 3, 1905.)

[86 S. W. Rep. 973.]

Injury to Employee—Duty of Master—Safety of Material.*—An instruction, in an action for injury to an employee from the spilling of sulphuric acid from carboys which he was moving, that if the carboys were defectively stoppered, making it dangerous to one handling them, and this was, or by the exercise of reasonable care could have been, known to the employer when the employee was directed to haul them, and such defective stoppering was not known to the employee, or he was not informed thereof by the employer, whereby he was injured, the employer was liable, is correct; the employer not being required to insure the safety of the condition of the material with which the servant is put to work, or bound at all hazards to know its condition.

Appeal from Circuit Court, Jefferson County, Common Pleas Division.

“Not to be officially reported.”

Action by Starling Collins against the Louisville & Nashville Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

Wm. A. Earl, for appellant.

Benjamin D. Warfield and *Helm, Bruce & Helm*, for appellee.

O'REAR, J. Appellant was a teamster in the employment of appellee. While engaged in transferring some carboys of sulphuric acid from one point of the city to another, a quantity of the liquid was spilt upon his person, seriously and probably permanently injuring him. The suit for damages against appellee charges it with having negligently failed to see to it that the carboys were securely stoppered, and with having negli-

*As to the degree of care required of a railroad company as a master, see foot-notes appended to *Weed v. Chicago, St. P., M. & O. Ry. Co.* (Neb.), 13 R. R. R. 797, 36 Am. & Eng. R. Cas., N. S., 797; *McCabe v. Montana Cent. Ry. Co.* (Mont.), 13 R. R. R. 564, 36 Am. & Eng. R. Cas., N. S., 564; *Hinzeman v. Missouri Pac. Ry. Co.* (Mo.), 13 R. R. R. 178, 36 Am. & Eng. R. Cas., N. S., 178; *Illinois Cent. R. Co. v. Prickett* (Ill.), 13 R. R. R. 139, 36 Am. & Eng. R. Cas., N. S., 139.

For the authorities in this series on the question of the care required of a railroad company, as an employer, in furnishing appliances, see foot-notes appended to *Smith v. Fordyce* (Mo.), 16 R. R. R. 378, 39 Am. & Eng. R. Cas., N. S., 378.

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gently failed to apprise him of the dangerous nature of the contents of the vessels; that he, in ignorance alike of their dangerous nature, as well as that they were not securely stoppered, and while in the exercise of ordinary care in attempting to unload one of them from his wagon, jostled it so that some of its contents were spilled, with the result stated. The case went to the jury. The verdict was for the defendant.

The errors alleged against the verdict and judgment are based upon the instructions given to the jury. These instructions aptly submitted to the jury appellee's duty to furnish appellant a reasonably safe place to work, and reasonably safe material with which to work, and that it was also appellee's duty to apprise appellant of the dangerous nature of the thing which he was handling; that if the carboys, or any of them, were defectively stoppered or closed, which made it dangerous to one handling or hauling them, and such condition was known, or by the exercise of reasonable care could have been known, to the defendant or its agents or servants superior in authority to the plaintiff at the time plaintiff was directed to haul it, and the defective stoppering was not known to the plaintiff, or he was not informed thereof by the defendant or its agents in superior authority to him, whereby he was injured, the jury should find for the plaintiff. We think this fairly embraced the law. Appellee was not required, as contended for by appellant, to insure the safety of the condition of the material with which its servant was put to work, nor was appellee bound at all hazards to know its condition. It was required merely to exercise ordinary and reasonable care in apprising itself of the condition, if it did not know it, and then to take such precautions to safeguard its servants as an ordinarily prudent person would have taken to protect himself from injury from the contents of the carboys under like circumstances.

The verdict of the jury was evidently based upon the third instruction, which submitted to them appellant's contributory negligence. There was testimony by a number of witnesses, the servants of the company superior to appellant, to the effect that they had told appellant before the injury, and when directing him to move the carboys of acid, of their contents, and of their dangerous nature, as well as of the care that he should take in handling them. There was also evidence to the effect that appellant was hurt while handling one of the carboys roughly, and without due regard to his own safety, considering the nature of its contents, and that he so admitted to a number of persons who were witnesses. The instruction covering appellant's contributory negligence was in the usual form, and is unobjectionable.

We are unable to find a prejudicial error in the matters complained of by appellant, and the judgment is therefore affirmed.

SHANNON *v.* UNION R. CO. (two cases).

(Supreme Court of Rhode Island, March 7, 1906.)

[63 Atl. Rep. 488.]

Master and Servant—Existence of Relation.*—Where a servant of a railroad, after cleaning a switch, boarded a car to proceed to another switch to perform a similar task and gave the conductor an employee's ticket, furnished him by the company, he was, during his passage on the car, an employee of the railroad, notwithstanding that it was Sunday and that the operation of the car was violative of Gen. Laws 1896, c. 281, § 17, making it an offense to do any labor or work on Sunday, except works of necessity and charity.

Action by Cormack Shannon against the Union Railroad Company. Judgment for defendant, and plaintiff petitioned for a new trial. Petition denied.

Argued before DOUGLAS, C. J., and DuBois, BLODGETT, and PARKHURST, JJ.

Gorman, Egan & Gorman, for plaintiff.

Henry W. Hayes, Frank T. Easton, Lefferts L. Hoffman, and *Alonzo R. Williams*, for defendant.

BLODGETT, J. 1. The record shows that on Sunday, the 29th of June, 1902, the plaintiff, who was an employee of the defendant, had been engaged in cleaning a switch on the road of the defendant, and then boarded a car to proceed to another switch on the road to perform a similar task. He gave to the conductor an employee's ticket which had been furnished by the defendant company, and before reaching his destination was injured by a collision between the car on which he was riding and another car of the defendant company. At the trial the plaintiff was non-suited, on the ground that the negligence of which he complained was that of a fellow servant, and to this ruling he duly excepted and preferred his petition for a new trial in this court. The ruling of which he complains was a correct ruling. He was traveling to perform his customary work at the time of the accident, and clearly sustained the relation of an employee rather than that of a passenger at the time. *Ionnone v. N. Y. N. H. & H. R. R. Co.*, 21 R. I. 452, 44 Atl. 592, 46 L. R. A. 730, 19 Am. St. Rep. 812, and cases cited.

2. The plaintiff, however, contends that the act of the defendant in running its cars on Sunday was an illegal act, because in violation of the Sunday law of the state, viz. (Gen. Laws 1896, c. 281, § 17): "Every person who shall do or exercise any labor or business or work of his ordinary calling, or use any game, sport, play, or recreation on the first day of the week,

*For the authorities in this series on the question, who are, and are not, the employees of a railroad company, see foot-notes appended to *Weisser v. Southern Pac. Ry. Co.* (Cal.), 18 R. R. R. 861, 41 Am. & Eng. R. Cas., N. S., 861.

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or suffer the same to be done or used by his children, servants, or apprentices, works of necessity and charity only excepted, shall be fined not exceeding five dollars for the first offence and ten dollars for the second and every subsequent offence." He further contends that there could be no valid contract on his part to perform work and labor of his ordinary calling on Sunday, and, consequently, that the relation of master and servant, as aforesaid, could not exist for the purposes of this case on that day. The argument does not convince us. If the operation of the cars on Sunday was lawful, as being a work of necessity, within the meaning of the statute, clearly he is not entitled to recover for the negligence of a fellow servant. But even if the cars were being operated contrary to law at that time, the plaintiff was admittedly traveling, on the very car so operated, for the like illegal purpose of performing work and labor of his ordinary calling on that day and for the express purpose of promoting and assisting in the like illegal running of other cars of the defendant on the same day and in the same manner. To concede the plaintiff's contention would result in this absurdity, viz., that he might have an action on the state of facts here shown to have existed on Sunday, although he could have had no action if the same facts had existed on any one of the six remaining days of the week; and it never has been held that the purpose of the Sunday laws was to give an action which otherwise could not be maintained. If the act of the defendant was illegal, the act of the plaintiff was equally so; and the law leaves him where it finds him, in accordance with the ancient maxim, "In pari delicto potior est conditio defendentis."

Plaintiff's petition for a new trial denied, and case remitted to superior court, with direction to enter judgment for the defendant.

LANNING v. CHICAGO GREAT WESTERN RY. CO. *et al.*

(Supreme Court of Missouri, June 1, 1906.)

[94 S. W. Rep. 491.]

Removal of Causes—Diverse Citizenship—Separable Nature of Controversy.*—An action in a state court against a servant of a railroad and the railroad jointly, for the negligence of the servant, and where any liability of the company was under the principle of respondent superior, the servant being a citizen of the state, and the railroad a corporation of another state, is not removable to the federal court, under Act March 3, 1887, c. 373, 24 Stat. 552, as corrected August 13, 1888, chapter 866, § 1, 25 Stat. 433 (1 U. S. Rev. St. Supp. 611 [U. S. Comp. St. 1901, p. 509]), providing that, when in any suit there shall be a controversy between citizens of different states, and which can be fully determined as between them, either one or more of the defendants may remove the suit into the federal court.

*See foot-notes appended to *Dudley v. Illinois Cent. R. Co.* (Ky.), 20 R. R. R. 844, 43 Am. & Eng. R. Cas., N. S., 844.

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Master and Servant—Fellow Servants—Operation of Railroads.†—The servant of a railroad company employed in working about a coal dock, and under the direction of a foreman, was not a fellow servant of a locomotive engineer who worked under the direction of a yard master, and who had nothing to do with the work on the coal dock except to push cars on the dock and pull them out with his locomotive.

Same—Instructions.—In an action for injuries to a servant employed by a railroad company, owing to the backing of a locomotive against a car about which he was working, there being ample evidence to the effect that the bell of the engine was not rung nor any notice given of the approach of the locomotive, and the court having instructed that if the bell was rung plaintiff could not recover, defendant could not complain of an instruction permitting plaintiff to recover if the engineer caused the locomotive to collide with the car without warning or signal which would be reasonably calculated to warn plaintiff.

Same.—In an action against a railroad for injuries to a servant owing to a locomotive having been pushed against a car about which plaintiff was working, the petition alleged that the engineer knew, or by the exercise of reasonable care could have known, that plaintiff was working about the car, and the engineer testified that he knew that plaintiff worked at the place in question all the time. Held, that an instruction permitting plaintiff to recover, without requiring him to establish knowledge on the part of the engineer, was not erroneous, as it was competent to prove such knowledge under the general allegation of negligence, and the jury were at liberty to consider the engineer's knowledge, though it was not made a condition of recovery in the instruction.

In Banc. Appeal from Circuit Court, Buchanan County; A. M. Woodson, Judge.

Action by John B. Lanning against the Chicago Great Western Railway Company and others. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Culver & Phillip, for appellants.

Allen & Mayer, for respondent.

GANTT, J. On April 17, 1903, the plaintiff began this action in the circuit court of Buchanan county, Mo. The petition, in substance, states that the defendant is a railroad corporation duly organized and incorporated under the laws of Minnesota and is conducting a railroad business in this state; that the defendant railroad has and owns within its railroad yards in the city of St. Joseph what is known as a coal dock; that said coal dock is a structure by which coal bins and chutes are erected and placed upon piers or trestle work about 20 feet above the surface of the ground; that approaching and extending to the surface of said bins and chutes is an elevated incline made of piers and trestle work; that bins, from one end to the other, cover a space of about 100 feet in length; that said incline from

†For the authorities in this series on the subject of the different department limitation of the fellow-servant rule, see foot-notes appended to *Kane v. Erie R. Co.* (C. C. A.), 20 R. R. R. 383, 43 Am. & Eng. R. Cas., N. S., 383; foot-notes appended to *Mollhoff v. Chicago, etc., R. Co.* (Okl.), 19 R. R. R. 709, 42 Am. & Eng. R. Cas., N. S., 709.

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the end of the bins to where the same reaches the level of the ground is about 300 feet; that upon the said incline and trestle work, and by the side of the said coal bins, the defendant maintains a regular railroad track, that defendant by its agents and servants, and by means of steam engines, pushes car loads of coal up said incline and up the side of the said bins and chutes, and that there the defendant railroad company has a gang of men whose duty it is to empty the coal from said cars to said coal bins and to work around and upon said coal dock; that just at the top of said incline track, about 40 feet from said coal bins, said defendant has erected and placed a large block attached to a large hinge, which fits over and upon one of the rails of said track and is used for the purpose of stopping and preventing cars that have been pushed upon said dock from running down and along said incline. It is then alleged that on December 4, 1902, the defendant's agent and servant in charge of one of defendant's engines had pushed three large box cars containing coal up and along said incline track, and upon said dock by the side of said coal bins. Plaintiff states that at all the time complained of the defendant John H. Gahagan was the agent and servant of the defendant as a locomotive engineer and was acting in the scope of his employment and agency; that on said day, while plaintiff was assisting in pushing said three large cars, which had been emptied, out of the way and along said railroad track on said dock in order to enable plaintiff and those working with him to clean up the coal that had dropped down on the floor of said dock between said cars and bins, and while plaintiff, in the exercise of due care and caution, was prizing one of the back wheels of the rear car of said three cars with a steel crowbar in order to cause said car to move forward, said defendant John H. Gahagan, in charge of one of defendant's engines, and in the course of his employment by defendant, carelessly, negligently, recklessly and wantonly, without giving any warning, or ringing any bell of said engine, or blowing the whistle of said engine, or by any other manner or means giving any notice to plaintiff, and while knowing, or by the exercise of reasonable care and diligence could have known, that plaintiff was working in and about said cars, directed and operated and ran said engine up and along said incline and caused it to come into violent contact and collision with said three cars, causing them to move backward, and the back wheels of the rear car of said three cars to roll upon the steel crowbar that plaintiff was using, as aforesaid, and causing said crowbar to catch and clinch plaintiff's right foot and leg between said crowbar and the iron rail of the railroad track, and thereby to crush and mangle plaintiff's right foot and leg; that plaintiff did not know that the said defendant Gahagan, in charge of said engine, was approaching said cars up said incline, and from plaintiff's position could not see or hear the approach of the said defendant Gahagan; that on account of the negligence and carelessness

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Of the said railroad company by its agents and servants aforesaid, and on account of the carelessness and negligence of the said agent and servant of the defendant, John H. Gahagan, plaintiff's right foot was mangled and crushed, and had to be amputated and taken off; that, by reason of the injuries aforesaid, plaintiff was and is permanently injured by the loss of his right foot; that plaintiff is 27 years old and was of robust health and earning \$45 per month; that he has no other business or avocation; that, on account of the loss of his said foot, he is incapable of earning a living and will never be able to earn a livelihood for himself; that, on account of said injuries, he suffered untold and excruciating physical pain and mental agony, and on account of all the premises he was and is damaged in the sum of \$25,000, for which he prays judgment. On the second day of the May term, 1903, the defendant railroad company filed its petition to remove said cause to the United States Circuit Court within and for the St. Joseph Division of the Western District of Missouri, on the ground that the controversy in said cause was wholly between citizens of different states; the defendant company being at the time a corporation organized and existing under the laws of Illinois, and the plaintiff being, at the time of the commencement of said suit, a resident and citizen of the state of Missouri. That the matter and amount in dispute exceeded, exclusive of interest and costs, the sum of \$2,000. That the time within which the company and its codefendant were required by the laws of this state to answer or plead had not expired, that the controversy between plaintiff and its said codefendant was wholly separable from the controversy between plaintiff and the defendant company, and the grounds of action charged in each of said controversies are based wholly upon different facts and principles of law. That the liability of the defendant company is widely different and distinct from the liability of the defendant company's codefendant, the said John H. Gahagan. That the said John H. Gahagan was and is improperly and fraudulently joined with the defendant company as a defendant in said cause, by reason of his citizenship in the state of Missouri, for the sole purpose of defeating the jurisdiction of the United States Circuit Court within and for said district and division thereof. Defendant at the same time tendered a bond with good and sufficient security for entering a copy of the record in said suit in the United States Circuit Court. On the hearing of said motion, it was conceded by plaintiff that the bond for removal was good and sufficient, but the court refused to grant the petition for removal and refused to order the cause removed to the Circuit Court of the United States. Afterward, on the 28th of September, 1903, the defendant filed an answer which consisted of a general denial, and a plea of contributory negligence on the part of the plaintiff, and, third, an assumption of the risk of any and all injuries that might have been caused or occasioned by reason

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of the facts stated in the petition. The reply was a general denial of all of the new matter set out in the answer. The cause was tried at the September term, 1903, of the circuit court of Buchanan county and resulted in a verdict for the plaintiff in the sum of \$5,000 against both defendants. A judgment was rendered accordingly. A motion for new trial was duly filed, heard, and overruled, and an appeal granted to this court.

Three grounds of error are assigned by the defendants for the reversal of the judgment:

1. It is first insisted that the Circuit Court erred in refusing to remove the case to the Circuit Court of the United States. Upon this point it is insisted that the plaintiff's petition upon its face presented a controversy between the plaintiff and the defendant railroad company, which was wholly separable from the controversy between the plaintiff and the defendant Gahagan; that the engineer was liable solely because of his personal act in doing the wrong, and the company was liable because it was responsible for the acts of its agent, and it is earnestly urged that where, as in this case, the cause of action alleged against a railroad company and one of its employees is based solely on the negligence of the employee, no concurrent negligence of the company being charged, that is to say no actual negligence on the part of the company as distinguished from imputed negligence, the cause is removable from the state to the federal court, under section 2 of the act of March 3, 1887, c. 373, 24 Stat. 552, as corrected August 13, 1888 (1 Rev. St. Supp. 611 [U. S. Comp. St. 1901, p. 509]), which provides: "And when in any suit mentioned in this section, there shall be a controversy which is wholly between citizens of different states and which can be fully determined as between them, then either one or more of the defendants actually interested in such controversy, may remove said suit into the Circuit Court of the United States for the proper district." In support of this contention numerous decisions of the federal Circuit Courts are cited and relied upon, but in our opinion the recent decisions of the Supreme Court of the United States, in the cases of *Alabama, Great Southern Ry. Company v. Thompson*, 26 Sup. Ct. 161, 50 L. Ed. —, and *Cincinnati N. & T. P. Ry. Company v. George Bohon, Adm'r of Edward Cook, Deceased*, 26 Sup. Ct. 166, 50 L. Ed. —, have foreclosed further discussion of this question on our part. This being purely a federal question, the judgment of the Supreme Court of the United States must be accepted as final. In *Alabama G. S. Ry. Co. v. Thompson*, the case reached the Supreme Court of the United States on a certificate from the United States Circuit Court of Appeals for the Sixth Circuit. The Circuit Court of Appeals certified to the Supreme Court the following questions: "May a railroad company corporation be jointly sued with two of its servants, one the conductor and the other the engineer of one of its trains, when it is sought to make the corporation liable only by

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reason of the negligent act of its said conductor and engineer in the operation of a train under their management and control, and solely upon the ground of the responsibility of a principal for the act of his servants, though not personally present or directing, and not charged with any concurrent act of negligence?" "Is such a suit removable by the corporation, as a separable controversy, when the amount involved exceeds \$2,000, exclusive of interest and costs, and the requisite diversity of citizenship exists between the said company and the plaintiff; the citizenship of the individual defendants sued with the company as joint tort-feasors being identical with that of the plaintiff?" To these questions the Supreme Court of the United States returned the following answers: "We answer the first question: That, for the purpose of determining the right of removal, the cause of action must be deemed to be joint. The view herein expressed leads to an answer to the second question in the negative." Mr. Justice Day delivered the opinion of the court and made an exhaustive review of all the cases, and, among other things, said: "As shown in the opinion of the Chief Justice in the Dixon Case, 179 U. S. 131, 45 L. Ed. 121, 21 Sup. Ct. 67, the cases are in difference as to whether a common-law action can be sustained against master and servant jointly because of the responsibility of the master for the acts of the servant in prosecuting the master's business. In good faith, so far as appears in the record, the plaintiff sought the determination of his rights in the state court by the filing of a declaration in which he alleges a joint cause of action. Does this become a separable controversy within the meaning of the act of Congress because the plaintiff has misconceived his cause of action, and had no right to prosecute the defendants jointly? We think, in the light of the adjudications above cited from this court, it does not. Upon the face of the complaint—the only pleading filed in the case—the action is joint. It may be that the state court will hold it not to be so. It may be (which we are not called upon to decide now) that this court would so determine if the matter shall be presented in a case of which it has jurisdiction. But this does not change the character of the action which the plaintiff has seen fit to bring, nor change an alleged joint cause of action into a separate controversy for the purpose of removal. The case cannot be removed unless it is one which presents a separable controversy wholly between citizens of different states. In determining this question the law looks to the case made in the pleadings, and determines whether the state court shall be required to surrender its jurisdiction to the federal court. * * * The Federal courts in some states hold a different rule as to the doctrine of fellow servants from that administered in the state courts, and in other ways administer the common law according to their own views. It has not been suggested that a right of removal should arise from such differences. No more has Congress given the right where the state permits the action to be prosecuted jointly which would be

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held to be several only in the courts of the United States." These decisions of the Supreme Court of the United States fully cover all the propositions as to the right of removal, which have been urged by the defendant corporation, and accordingly it must be held that the circuit court committed no error in refusing to remove the cause to the United States Circuit Court.

2. The next assignment of error is leveled at the first instruction which the court gave for the plaintiff. This instruction, in substance, required the jury to find that the plaintiff was in the employ of the defendant company, and, while acting in the scope of his employment, he was engaged in prizing the rear wheel of the railway car on the coal dock in the railroad yards of the defendant, and that the defendant Gahagan was an engineer in charge of one of the defendant's engines, and while acting in the scope of his employment as such engineer, and without any warning or signal that would be reasonably calculated to warn the plaintiff of the approach of his engine, negligently caused his engine to come in contact and collision with the cars on the dock, as mentioned in the evidence, and thereby cause the rear wheel of said car to run down the pinch bar in the hands of the plaintiff, and thereby cause plaintiff's right foot to be caught and pinched by the pinch bar, and plaintiff's foot to be injured as mentioned in the evidence, then they would find for the plaintiff. The objection to this instruction is that the plaintiff and the defendant Gahagan were fellow servants, and therefore the defendant was not liable for the injuries resulting from the negligence of Gahagan. The evidence discloses that the plaintiff was a member of a crew employed by the defendant to work on the dock and handle the coal. Hiram Sollers was the foreman of this crew. This crew had nothing to do with the running of the engine or trains. The defendant Gahagan was an engineer in the employ of the company in charge of an engine and worked under the direction of a yardmaster by the name of Botsford. Gahagan had nothing to do with the dock work except to push cars in on the dock and pull them out with his engine. The foreman of the dock crew had no control whatever over the movement of the company's engines. Plaintiff and defendant Gahagan were thus employed in widely different departments, "each looked to a different individual as the master's representative for directions in his work, and had no practical connection with the superior who guided and supervised the acts and conduct of the other." In *Sullivan v. Railroad Co.*, 97 Mo. 113, 10 S. W. 852, it was held by this court that a track walker on the railroad is not a fellow servant with the locomotive engineer, or fireman of a passenger train, and in *Condon v. Railroad Co.*, 78 Mo. 567, it was ruled that a car repairer at a station and a trainman were not fellow servants, within the meaning of the rule that exempts the company from liability to a servant for injuries occasioned by the negligence of another servant. And in *Hall v. Railroad Co.*, 74 Mo. 298,

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it was held that the section foreman and switchman were not fellow servants, and in *Dickson v. Railroad Co.*, 104 Mo. 491, 16 S. W. 381, a quarry laborer under orders of a foreman, who had control of the quarry and represented the company there, was not a fellow servant with the trainmen on a passenger train. In view of these decisions we think that the workmen, so distantly related to each other in the service of a common master as plaintiff and Gahagan were, were not fellow servants, within the meaning of the rule which exempts the master from liability for injuries inflicted by a fellow servant upon a fellow servant. It would serve no good purpose to enter upon a general discussion, or attempt to enumerate the cases in which employees of a common master are held to be or not to be fellow servants. In our opinion the reason of the rule forbade its application to the facts in this case, and we think there was no error in the giving of instruction No. 1 for the plaintiff, so far as this objection is concerned. Nor is there any merit to the other objection to the instruction on the ground that it permitted the plaintiff to recover if the engineer caused the engine to collide with the cars under which plaintiff was working, "without giving any warning or signal that would be reasonably calculated to notify and warn the plaintiff of the approach of said engine." There was ample evidence to the effect that the bell of the engine was not rung, nor any other warning or notice given of the approach of the engine, and the jury were fully justified in finding that the bell was not rung. On behalf of the defendants, the court instructed the jury that if the bell was rung plaintiff could not recover. The defendants have no cause of complaint on this score.

Again, it is objected that, although the petition contained the averment that the engineer "well knowing, or by the exercise of reasonable care and diligence could have known, that plaintiff was working in and about said cars," yet this instruction permitted plaintiff to recover without requiring him to establish such knowledge on the part of the engineer. That the engineer did know that the crew to which plaintiff belonged worked on the dock all the time was established by his own testimony. The instruction required the jury to find that the engineer, without giving any warning or signal to notify plaintiff of the approach of his engine, negligently ran the engine in his charge so as to collide with the cars under which plaintiff was working. Certainly the allegation of the petition as to his knowledge of plaintiff's presence on the dock was established, and, in determining whether he was guilty of negligence in causing his engine to collide with said cars and forcing them to back over plaintiff, the jury were at liberty to consider his knowledge of the danger to plaintiff, even though it was not made a condition of plaintiff's recovery in the instruction. Under the general allegation of negligence it was entirely competent to prove such knowledge, and the instruction was well enough in view

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of the evidence and the theory upon which both parties tried the cause.

3. Finally, it is insisted that the circuit court erred in not sustaining the demurrer to the evidence at the conclusion of all the evidence. We deem it unnecessary to recapitulate all the testimony to demonstrate that the evidence sustained the charge of negligence on the part of the engineer in running his engine against the stationary cars behind which plaintiff was working, with his knowledge at the time, without giving plaintiff's crew any warning of his approach. The plaintiff was not a trespasser. He was working at his usual work and place, under the direction of his foreman, and along with said foreman and the other members of his crew. That not one of his crew heard the bell or any other warning is attested by the established fact that the foreman, Sollers, was knocked against the guard-rail of the chute, and Woods, another of the gang, was knocked down. That all of this crew of grown men should have neglected a warning in such a perilous position is contrary to all human experience. They each testified they heard none, and, considering their proximity to the engine, some one would have heard it if it had been rung. In such circumstances the argument against negative testimony loses much of its force. The suggestion that the noise made by the "exhaust" of the engine drowned the sound of the bell does not appeal with much force to us, inasmuch as the crew, none of them, heard it, and they were knocked in every direction when the engine struck the cars. Obviously the jury found the engineer did not ring the bell or give any other warning of his approach. The court was exceedingly liberal to defendants in instructions. There was no error in refusing the demurrer to the evidence.

The judgment of the circuit court must be and is affirmed.

BRACE, C. J., and BURGESS, VALLIANT, FOX, LAMM, and GRAVES, JJ., concur.

NEAGLE v. SYRACUSE, B. & N. Y. R. Co.

(Court of Appeals of New York, May 25, 1906.)

[77 N. E. Rep. 1064.]

Master and Servant—Death of Railway Employee—Negligence in Conduct of Work.—A railroad fireman, employed in removing snow from the track, was killed by a derailment of the locomotive. A week before the accident the railroad had a gang of men shoveling snow from the track. While they removed the loose snow, patches of ice as high as the top of the rails were allowed to remain. A day or two before the accident, there was another fall of snow, and on the day of the accident it was attempted to remove the snow by a snow plow propelled by locomotives. Held, that the liability of the railroad depended on the question whether it was negligent in the conduct of the work, and not whether it was negligent in failing to furnish a safe place to work.

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Same.*—Except as modified by the employers' liability act, a master, in the discharge of the duty of furnishing to its employees a safe place in which to work, is responsible for the negligence of any of its employees, while as to the conduct of the work he is responsible only for his own negligence, and not for the negligence of a co-servant.

Same—Negligence—Evidence.—In an action for the death of a railroad fireman while removing snow from the track in consequence of a derailment of the locomotive, evidence examined, and held not to warrant a finding of negligence on the part of the company in the conduct of the work, necessary to render it liable.

Same—Fellow Servants.†—A railroad fireman, employed in removing snow from the track, was killed by a derailment of the locomotive in consequence of the existence of ice as high as the top of the rails. The ice was visible to the track walker, and he did not point out the particular places at which the patches of ice were found. Held that, as the duty of the track walker to point out the ice to be removed was a detail of work, the track walker and the fireman were fellow servants, relieving the railroad from liability.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Garrett Neagle, administrator of Garrett Neagle, Jr., deceased, against the Syracuse, Binghamton & New York Railroad Company. From a judgment of the Appellate Division (95 N. Y. Supp. 884, 109 App. Div. 339), affirming a judgment for plaintiff, defendant appeals. Reversed, and new trial granted.

*For the authorities in this series on the question, what are the duties of a railroad company which it cannot delegate, so as to escape liability for injuries to its employees, under the fellow-servant rule, see foot-notes appended to *Chicago Union Traction Co. v. Sawusch* (Ill.), 18 R. R. R. 856, 41 Am. & Eng. R. Cas., N. S., 856; *Meehan v. Great Northern Ry. Co.* (N. Dak.), 18 R. R. R. 34, 41 Am. & Eng. R. Cas., N. S., 34; *Wood v. Rio Grande W. Ry. Co.* (Utah), 18 R. R. R. 20, 41 Am. & Eng. R. Cas., N. S., 20; *Alabama Great Southern R. Co. v. Vail* (Ala.), 17 R. R. R. 718, 40 Am. & Eng. R. Cas., N. S., 718.

†For the authorities in this series on the question whether trainmen are fellow servants of track walkers, or others having similar duties to perform with respect to the safety of the track, see *Hamilton v. Michigan Cent. R. Co.* (Mich.), 12 R. R. R. 365, 35 Am. & Eng. R. Cas., N. S., 365 (inspector of roadbed and engineer of train are not fellow servants); note, 14 Am. & Eng. R. Cas., N. S., 586; *Bateman v. Peninsular Ry. Co.* (Wash.), 12 Am. & Eng. R. Cas., N. S., 678 (locomotive fireman and section foreman are not fellow servants); *Omaha & V. R. R. Co. v. Krayenbuhl* (Neb.), 4 Am. & Eng. R. Cas., N. S., 483 (locomotive engineer and section boss are not), *Stephani v. Southern Pac. Co.* (Utah), 14 Am. & Eng. R. Cas., N. S., 575 (engineer of wrecking engine and track walker are fellow servants).

For the authorities in this series on the subject of the different department limitation of the fellow-servant rule, see foot-notes appended to *Louisville & N. R. Co. v. Martin* (Tenn.), 18 R. R. R. 413, 41 Am. & Eng. R. Cas., N. S., 413; foot-notes appended to *Conine v. Olympia Logging Co.* (Wash.), 15 R. R. R. 387, 38 Am. & Eng. R. Cas., N. S., 387.

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William S. Jenney, for appellant.

Frank C. Sargent, for respondent.

CULLEN, C. J. This action was brought to recover for the death of the plaintiff's intestate, a fireman in the employ of the defendant, who was killed by the derailment of a locomotive. In February, 1902, the westerly track of defendant's railroad near Cortland Junction had been obstructed for some time by heavy falls of snow. A week or so prior to the accident the defendant had a gang of men shoveling snow from the track. The evidence adduced by the plaintiff tended to show that, while the shovelers removed the loose snow, they found at points large patches of ice, which were as high as the top of the rails, and that this condition of the track was visible to the track walker. A day or two before the accident there was another fall of snow, and on the day of the accident it was attempted to remove this snow by a snow plow propelled by two locomotives. While this train, if it may be so called, was proceeding along the track, the plow and engines were derailed and overturned, and the plaintiff's intestate killed. In our opinion there was evidence from which the jury could have found that the presence of the ice between the rails caused the derailment. The defendant's motion, at the close of the evidence, to dismiss the complaint was denied and an exception taken. The cause was submitted to the jury, which rendered a verdict for the plaintiff, and the judgment entered on that verdict has been affirmed in the Appellate Division by a divided court.

The cause was tried by the plaintiff, presented to the jury at Trial Term, and has been affirmed by the Appellate Division on what we deem a fundamentally erroneous view of the principle of law governing the case—that it was the duty of the master to furnish its servants a reasonably safe place to work, and that the questions in issue in the case were whether the presence of the ice rendered the tracks and road of the defendant unsafe and whether the defendant was negligent in allowing them to remain in that condition. It is conceded that in no other respect than the presence of the ice was there any defect in defendant's road. In this climate a fall of snow during the winter months and the obstruction of railroads thereby to a greater or less extent is of regular occurrence, and the removal of the snow during that season is part of the operation of a railroad. It is unnecessary to consider whether, as to train crews engaged in the ordinary transportation of passengers and freight, the removal of snow is to be deemed a detail of the single common work of operating the railroad in which they are all engaged. Such was plainly the case as to the plaintiff's intestate, for the very work in which he was engaged was the removal of the snow. Nor can there be any proper differentiation between the snow and the ice which had been formed from the snow. Even if we assume, as the plaintiff's evidence tended to show, that only loose snow could be removed by the plow,

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the removal of the snow and of the ice formed by it were but separate stages or parts of a single work. In *Murphy v. Boston & Albany R. R. Co.*, 88 N. Y. 146, 42 Am. Rep. 240, the plaintiff's intestate was employed in testing a locomotive which had been sent to the repair shop. During the test the boiler exploded, owing to the defective condition of bolts, for which the boilermakers had negligently failed to substitute new ones. It was held that the deceased and the boilermakers were fellow servants, though a different rule would have obtained had the locomotive been furnished to the trainmen for use on the road. It was said by Judge Andrews that the claim that the master was "responsible to each successive employee engaged on the repairs for any negligence of a co-employee whose work was prior in point of time, although done in effecting the common purpose in which all were engaged" could not be sustained. Therefore the real question in this case was not of negligence in failing to furnish a safe place to work, but negligence in the conduct of the work. This distinction is of vital importance, because the furnishing of a place to work is a part of the master's duty, and in the discharge of that duty he is responsible for the negligence of any of his employees, while as to the conduct of the work he is responsible only for his own negligence or that of his alter ego, not for the negligence of a co-servant. *Loughlin v. State of N. Y.*, 105 N. Y. 159, 11 N. E. 371; *Webber v. Piper*, 109 N. Y. 496, 17 N. E. 216; *Cregan v. Marston*, 126 N. Y. 568, 27 N. E. 952, 22 Am. St. Rep. 854. This rule has been somewhat modified by the employer's liability act, but that statute was enacted subsequent to the accident before us.

We are unable to see that any personal negligence of the master in the conduct of the work was established by the evidence. The testimony of the plaintiff tends to show that where the fall of snow is very light the ordinary practice is to run a flanger over the road, so as to remove snow that adheres to the sides of the rails. Where the fall is heavier, a snow plow is first used. The flanger follows. At times and in places the snow on the track may be too deep for a snow plow to go through it. Then the snow, at least in part, must be removed by shovels. It also appears that the ordinary custom is to remove ice by picks from switches or frogs at stations, between the boards and rails at highway crossings, and at special places, such as near water tanks, where it is apt to accumulate from the drippings from the tank. Between stations and in what may be termed the open country the universal practice is to run the snow plow over the track. According to some witnesses of the plaintiff, when notice was given that at some particular point there was a large bed of ice, the plow would be there stopped and the ice removed by hand. One witness testified that they relied on the track walker to point out to them any such beds of ice. The testimony of such a practice is very unsatisfactory; the witnesses conceding that as a matter

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of fact snow plows are run over rails covered with ice, and that ice is not likely to accumulate on a track which is in use and over which trains pass. There is uncontradicted evidence to show that at least one train safely passed over the track shortly before the fall of the snow which plaintiff's intestate was engaged in removing, and during the time when the plaintiff contends that the patches of ice should have been seen by the track walker. Under this proof we think that negligence could not be predicated of the manner in which the defendant conducted its operations.

Moreover, if it should be assumed that the evidence warranted a finding that running the plow over the track without stopping to remove impacted ice was negligence, there is no evidence that the defendant knew of such a condition. The track walker denied that there was any such situation, but the plaintiff contends that it existed, that the track walker should have known the fact, and that his knowledge or neglect in failing to know was imputable to the company. We think not. Doubtless, so far as inspecting the track, the roadbed, and whatever was appurtenant to the permanent way, he was discharging the duty of the master. His knowledge was that of the master, and his neglect was that of the master. Such also would have been the case if a landslide had obstructed the track. The obstruction here, however, was of a very different character. It was one which was known to all parties, of common and natural occurrence, and the plaintiff's intestate, with others, was engaged in removing it. If we assume that it was the track walker's duty to have pointed out particular places at which the snow plow should have been halted and the ice removed by hand, that, in our opinion, was not part of the master's duty to see to a safe roadway, but a detail of the work of removing the snow, and the negligence of the track walker was that of a fellow servant. In *Brick v. Rochester, N. Y. & P. R. R. Co.*, 98 N. Y. 211, an employee, engaged in the repair of a dilapidated railroad, riding on the construction train, was killed by the derailment of the cars. The foreman was charged with the duty of seeing that the crossings were safe. Frozen mud and ice at a crossing derailed the train. It was held that the negligence of the foreman in this work was the negligence of a fellow servant. The same principle controls the present case. That case differs from the present one in detail and circumstance but not in principle. The duty of the track walker in this case to point out the ice to be removed was of the same character as that of the foreman in the other case; that is to say, a duty as to a detail of the work.

The judgment should be reversed, and new trial granted; costs to abide the event.

O'BRIEN, HAIGHT, VANN, WERNER, and WILLARD BARTLETT, JJ., concur. HISCOCK, J., not sitting.

Judgment reversed, etc.

VICKSBURG RY. & LIGHT CO. v. MILES.

(Supreme Court of Mississippi, April 30, 1906.)

[40 So. Rep. 748.]

Electricity—Operation of Street Railroads—Injury to Animal—Evidence.*—In an action against a street railroad for injuries to a horse, while crossing defendant's track, by reason of an electric shock, evidence to show by a continuous series of instances that other horses had received similar shocks by stepping on the track at other places, and that the officials of defendant were advised of such facts, was competent as showing that the injury did not arise from any unavoidable accident, but that it was caused by continuous negligence, and as showing that electricity caused the accident.

Appeal from Circuit Court, Warren County; O. W. Catchings, Judge.

Action by Ben Miles against the Vicksburg Railway & Light Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Suit for damages to recover the value of a horse alleged to have been injured while crossing the track of the appellant street railway by receiving an electric shock which threw him to the ground, breaking his leg, thereby rendering him useless to his owner, who had him shot. The proof for the plaintiff below shows that the horse stepped on the track near the power house, fell suddenly to the ground, and was found to have broken a leg. Plaintiff offered evidence to show by a continuous series of instances that other horses had received similar shocks by stepping on the track of the appellant railway company at other places on its line, and that the officials were fully advised and notified. This evidence was objected by the railway company, for the reason that it did not show a specific defect, but was admitted by the court on the ground that it tended to show the continued negligence of the railway company in not keeping its track in a safe condition. The defendant entered a plea to the general issue. The case went to a jury, and resulted in a verdict and judgment for the plaintiff, from which this appeal is prosecuted.

Smith, Hirsh & Landau, for appellant.

Hudson & Fox, for appellee.

CALHOON, J. It cannot be doubted that the injury to the horse was caused by a loose connection of the bond wires, preventing proper ground connection, thus causing an arc along the track on the passage of the train. To show that this did not arise from an unavoidable accident, not to be foreseen or provided against, but that it was because of long-continued negligence over the whole of the road, and which was the subject

*See extensive note, 19 R. R. R. 275, 42 Am. & Eng. R. Cas., N. S., 275.

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of complaint to the company, as cumulative evidence that electricity caused the hurt, it was competent to show other shocks to other animals in other parts of the line, operated by one current, and complaint made. See 15 Cyc. 478 and notes. This involves no danger of a confusion of issues. An electric current over a car line is a continuous stream, and, properly bonded and connected, is free from danger, and a matter of easy proof by the operator. In showing that electricity, negligently controlled, was the origin of the particular event, it was properly allowed to show other instances of similar results along the same circuit. 1 Wigmore on Evidence, §§ 441-443; Id., note to page 542. It is of the same nature as evidence of frequent emission of sparks by an engine to show its negligent construction, and adding to the probability that it set out the particular fire. An electrical current over the same conductor is just as much one thing as an engine is. 1 Wigmore, Evidence, § 452 et seq.

Affirmed.

ARCHISON, T. & S. F. Ry. Co. v. FRONK.

(Supreme Court of Kansas, Nov. 10, 1906.)

[87 Pac. Rep. 698.]

Master and Servant—Railroad Employees.*—A student brakeman, who, in consideration of being permitted to ride on a railway company's freight train to observe and learn the duties of a freight brakeman, agrees to perform service on its engines, trains, and cars, while learning such duties, is an employee of the company.

Same—Injuries—Exemptions from Liability.†—Under the statutes of this state a contract entered into by such employee exempting the company from all liability for damages which he may sustain in consequence of the negligence of the company, its agents, servants, or employees, is against public policy, and void.

Burch, J., dissenting.

(Syllabus by the Court.)

Error from District Court, Stafford County; J. W. Brinkerhoff, Judge.

Action by C. A. Fronk, administrator of Elmer Tindall, against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

*For the authorities in this series on the question, who are, and are not, the employees of a railroad company, see foot-notes appended to *McColligan v. Pennsylvania R. Co.* (Pa.), 20 R. R. R. 427, 43 Am. & Eng. R. Cas., N. S., 427; foot-notes appended to *Wiest v. Coal Creek R. Co.* (Wash.), 20 R. R. R. 398, 43 Am. & Eng. R. Cas., N. S., 398; *Baker's Adm'r v. Lexington & E. Ry. Co.* (Ky.), 20 R. R. R. 223, 43 Am. & Eng. R. Cas., N. S., 223; foot-note appended to *Chicago, etc., R. Co. v. Weber* (Ill.), 19 R. R. R. 34, 42 Am. & Eng. R. Cas., N. S., 34.

†See foot-notes appended to *Chicago, etc., Ry. Co. v. Hamler* (Ill.), 19 R. R. R. 252, 42 Am. & Eng. R. Cas., N. S., 252.

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A. A. Hurd, O. J. Wood, W. R. Smith, and A. A. Scott, for plaintiff in error.

D. A. Banta and T. W. Moseley, for defendant in error.

GREENE, J. This action was commenced by C. A. Fronk, administrator of the estate of Elmer Tindall, deceased, to recover damages for the death of Tindall alleged to have been occasioned by the negligence of the servants and employees of the defendant, the Atchison, Topeka & Santa Fe Railway Company. It is alleged in the petition that at the time Elmer Tindall received the injuries from which he died, he was in the service of the defendant as a student brakeman on a freight train; and that through the negligence of the agents, servants, and employees of the defendant company, there was a collision between another freight train and the one upon which Elmer Tindall was riding, causing his death.

In avoidance of its liability the defendant pleaded the following contract between it and Elmer Tindall, entered into before it admitted him upon its trains as a student brakeman, and alleged that it was under the terms and conditions of this contract that Tindall was upon its trains when he was killed:

“Santa Fe

“(Insert name of Railway Company.)

“Application to Learn Work of Freight Brakeman or Fireman, and Release.

“Whereas, I, the undersigned, Elmer Tindall, residing at Hoisington, in the state of Kansas, and being 25 years of age, desiring to learn the work necessary to fit myself for the occupation of a brakeman on freight trains, have applied to Atchison, Topeka & Santa Fe Railway Company for an opportunity of learning said work, and to that end have requested the privilege of working on and about the locomotives, trains and cars of said railway company without expectation or promise of receiving wages or any pay whatever for work so done during such time, and without being considered as an employee of said company during said time; and whereas, the railway company is willing to grant me the privilege above applied for on the representation and statement above made, but on account of the dangers to which I may be exposed, also requires that the railway company, its officers and agents, shall be relieved from all liability for damage, injury or death sustained by me while so working, or while riding, walking or standing on or about such locomotives, trains or cars, or while on or about the property or premises of the railway company; now, therefore, in consideration of said company granting me the permission and privileges hereinbefore mentioned, I do hereby agree to and do hereby assume all dangers of such work and risks of injuries which may be sustained by me in or about such work, whether the same may be caused by or arise from the negligence of the

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railway company or of the officers, agents or servants thereof, or otherwise, or which I may receive from any cause whatsoever during the term of my connection with said company in learning the work aforesaid; and I hereby release and forever discharge said Atchison, Topeka & Santa Fe Company, and the officers and agents thereof, from any and all claims, demands, suits or liabilities of any kind for death or for any injury that I may sustain, whether the same be caused by or arise from the negligence of the said railway company, or of the officers, agents or employees thereof, or otherwise, during the term of my connection with said company in learning the work aforesaid, while upon or about such locomotives, trains or cars, or while walking or standing on or about the same, or while on or about any such property or the premises of said railway company; and I further agree that I will not claim any wages or compensation for any work that I may do during such time, nor claim to be in the employ of said company nor an employee thereof during such time.

"Witness my hand and seal at Dodge City, State of Kansas, this 4th day of August, 1904.

"Elmer Tindall [Seal.]

"Signed in presence of H. C. Duncan, Witness."

To this defense the plaintiff demurred, which was sustained, and the defendant brings the cause here for review.

The relation of the parties at the time Elmer Tindall was killed is one of the controlling questions in this controversy. The plaintiff in error contends that under the contract upon which Tindall was permitted to go and remain on its trains he was a mere licensee for his own personal benefit, and by the contract had expressly waived any claim for damages resulting to him in consequence of the negligence of the company's agents, servants, and employees. In determining the relation of parties courts are not bound by the agreements of the parties as to what such relations shall be or to the legal effect of its terms. Notwithstanding such agreements, whenever the question is properly presented courts will analyze the elemental facts of the agreement and determine therefrom the actual relations of the parties. In *Missouri Pacific Ry. Co. v. Ivy*, 71 Tex. 409, 9 S. W. 346, 1 L. R. A. 500, 10 Am. St. Rep. 758, which was an action for damages for personal injury sustained by one who was shipping cattle under an agreement, indorsed on the back of the shipping contract, that the shipper was an employee of the railway company, it was said: "By the agreement indorsed on the back of the contract, he agrees that he is the employee of the company. but that is evidently a fiction to provide for the release of the company from damages for personal injuries occasioned by the negligence of its servants. It is a pretense, a subterfuge, upon which to predicate the discharge of the company for damages in a plausible form. The true relations

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of the parties cannot be changed by such an agreement. It states a fact which is untrue; the agreement that it is true does not make it so. It amounts to this: Knowing that a contract would be of doubtful validity that absolved the company or limited its liability as a common carrier of passengers, the contract was devised in which the passenger acknowledges himself to be an employee of the company, so as to contract for its limited liability upon such relation, and give it the semblance of legality. If the liability of a common carrier cannot be limited liability upon such relation, and give it the semblance be done upon false or counterfeited relations." Persons capable of contracting are at liberty, inter parties, to make any contract that may to them seem advantageous, provided, however, that such contracts do not attempt to transgress the law or contravene public policy. But, in the exercise of their right to contract, persons are powerless, by contract or otherwise, to conclude one another by agreeing to place upon the terms of their agreements a legal construction different from that which the law places upon them, or a construction prohibited by public policy. Going beyond the mere conclusions stated in the contract, and analyzing the facts, as they appear from the contract itself, for the purpose of determining the actual relations of the parties at the time Tindall was killed, the conclusion is irresistible that Tindall was in the service of the railway company, and, as between him and the company while in the discharge of duties assigned to him, he was entitled to protection from the negligence of the company's servants.

The contract is adroitly drawn. Its apparent purpose is to relieve the company from liability to Tindall for injuries sustained while working for the company, in consequence of the negligence of the company's agents, servants, or employees. In expressing the duties to be performed by Tindall the language is permissive only; but the services which the agreement contemplates that Tindall should perform for the company are sufficient to justify the conclusion that while performing such services he was an employee of the company. The railway company was not conducting a free school for the education of freight brakemen, nor was Tindall riding gratuitously on the defendant's train at the time he was killed, but was working for the company, assisting in the operation of the train. Notwithstanding the agreement to the contrary the elemental facts created the relation of master and servant. The compensation of the company for the privileges granted to Tindall was the work to be performed by him as freight brakeman. In California a railroad company is not liable for injuries to an employee in consequence of the negligence of a co-employee, and in *Weisser v. Southern Pac. Ry. Co.* (Cal. Sup.) 83 Pac. 439, the relation of a railroad company to a student brakeman, who was working for the purpose of qualifying himself for a brakeman, and for no other consideration, was considered. It was

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argued by the railroad company that the brakeman was an employee. The court said that it was unnecessary, in disposing of the appeal to determine the relation of the parties, but it "has been discussed by counsel, and its determination may be necessary for the purposes of a new trial," and proceeded to pass upon the question, using the following language: "As such 'student brakeman,' he was entirely subject to the orders of defendant, and was required to perform such ordinary duties of brakeman as were allotted to him, just as fully as if he had been assigned regular employment for a pecuniary compensation by defendant. It is difficult to conceive of any reason why one, situated as these circumstances show plaintiff to have been, should be held to be other than an employee of the defendant, subject to all the obligations imposed by that relation. He was certainly in the service of defendant, regularly engaged in the doing of the defendant's business. The simple fact that he was not to be paid any money for his services cannot affect the question. It was perfectly competent for him to agree to serve an apprenticeship without pecuniary consideration. The important thing is that he voluntarily entered and was engaged in the service of the defendant upon such terms as he had seen fit to agree to. While so engaged in such service, there was no distinction, material to the question under discussion, between his situation and that of the other employees on the train." A similar question was before the federal court in *Huntzicker v. Illinois Cent. R. Co.*, 129 Fed. 548, 64 C. C. A. 78, where a young man wishing employment as flagman, upon applying to the railroad company for such position, was informed that he had not had sufficient experience. He then applied for, and was granted, permission to go upon the trains of the company, and by observation and experience learn what the duties of a flagman were. While so engaged, and upon his own application, he was ordered to appear at the trainmaster's office to be re-examined as to his proficiency. While riding upon a train to the trainmaster's office for such purpose a collision occurred, and he was killed. In determining the relation of the parties the court said: "As there was no controversy over the facts, the question became one of law, and the court performed a duty of its own in deciding it. The agreement between the parties, reduced to its elements, was that the defendant was to furnish the plaintiff the facilities for qualifying himself for the duties of a flagman; that is to say, it was to give him instruction and transportation over its road; not such transportation as is due to a passenger, but such as is ordinarily incident to the operation of freight trains by men in that service. In consideration of this, Fereday was to perform such elementary and simple service as he was capable of under the direction of the conductors of trains." * * * "Applying the controlling principles which we have indicated to the present case, it seems clear that *Fereday* at the time of his death was a servant of the

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defendant. He was enjoying the privilege for which he served. He was under the control of the defendant, and the company would undoubtedly have been responsible for the manner in which he performed his service; and, what is more important, under the test above stated he had no interest whatever, other than that which any servant has in the result of his service, in the consequences of the discharge of his duties. We are therefore of opinion that the court did not err in its direction to the jury." In the cases cited there was no contract attempting to determine the relation of the parties. The law, however, determines that question, and it must be held in this case that the relation was that of master and servant.

It is also contended that the waiver by the deceased of any claim for damages for injuries in consequence of the negligence of the company, its employees, agents, or servants, is a complete defense in this action. With this we do not agree. Our statute provides that: "Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of such company in consequence of any negligence of its agents, or by any mismanagement of its engineers or other employees to any person sustaining such damage." Gen. St. 1901, § 5858. The state has an interest in the lives, health, and safety of its citizens, and whenever a business, although lawful in itself, is dangerous to the lives or injurious to the health of the employees engaged in conducting such business, it becomes a question of public concern and the state may intervene in the interest of public welfare. We have many such statutes enacted in the interest, and for the protection, of different classes of citizens. The owner or lessee of coal mines, worked by means of shafts, is required to maintain escapement and ventilating shafts in accordance with certain prescribed rules, and is prohibited from having more than five pounds of powder in any such mine at one time. The protection thus provided by the state for the safety of its citizens is a matter of public concern and cannot be contracted away by the individual. In many other states we find instances where the state has intervened for the protection of its citizens who are engaged in business hazardous to health. In Utah a statute was enacted prohibiting a certain class of minors from laboring more than 8 hours in each 24. A contract was made between the employer and one of his employees that the employee should work 12 hours in each 24. An action was brought by the employee to recover for the time so worked over the 8 hours. In passing on the question in *Short v. Mining Co.*, 20 Utah, 20, 57 Pac. 720, 45 L. R. A. 603, the court said: "We are further of the opinion that the right to waive this legislative protection is without the power of the employee. This law is in the nature of a state police regulation. Its object is the good of the public as well as of the individual. The state in this matter has intervened in its own behalf. This protection to the state cannot at

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will be waived by any individual, an integral part thereof. The fact that the individual is willing to waive his protection cannot avail, the public good is entitled to protection and consideration, and if in order to effectuate that object there must be enforced protection to the individual, such individual must submit to such enforced protection for the public good." A similar question arose in Rhode Island, in *Re Ten Hour Law*, 24 R. I. 603, 54 Atl. 602, 61 L. R. A. 612. The question arose under a law limiting the hours of the labor of an employee on a street car. Two questions were submitted by the Governor to the judges of the Supreme Court: First, Is the law constitutional? Second, if constitutional, can it be waived by contract? The first was answered in the affirmative, and on the second question it was held that the purpose of the law was to limit the continuous service of such employees in the interest of public safety, and that public safety cannot be made to depend on private contract. In considering a similar question in *Holden v. Hardy*, 169 U. S. 356, 397, 18 Sup. Ct. 383, 390, 42 L. Ed. 780, the court said: "But the fact that both parties are of full age and competent to contract does not necessarily deprive the state of the power to interfere where the parties do not stand upon an equality, or where the public health demands that one party to the contract shall be protected against himself. 'The state still retains an interest in his welfare, however reckless he may be. The whole is no greater than the sum of all the parts, and when the individual health, safety, and welfare are sacrificed or neglected, the state must suffer.'" For the reasons suggested, a contract by one entering the service of a railroad company waiving his right of action for damages which he may receive in consequence of the negligence of its agents, servants, or employees is void.

The judgment of the trial court is affirmed, and the cause is remanded, with instructions to proceed with the cause.

JOHNSTON, C. J., and MASON, SMITH, PORTER, and GRAVES, JJ., concur.

NORFOLK & W. RY. CO. v. McDONALD'S ADM'X.

(Supreme Court of Appeals of Virginia, Nov. 22, 1906.)

[55 S. E. Rep. 554.]

Master and Servant—Death of Servant—Negligence of Master.—Where an employee of a railroad, engaged in removing rails from a car by means of a rope and hooks attached to the rails of a track and a rail on the car, was struck and killed by the hook attached to the rail of the track because of its straightening out and flying up when the rail on the car was caught, the accident happening so quickly that the time could not be estimated even in seconds, this did not show the railroad guilty of negligence, conceding that the engine was out of order, that the fireman who handled it was incompetent to discharge the duties of an engineer, and that there was an insufficient number of employees engaged in unloading the rails.

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Same—Evidence—Burden of Proof.*—In an action for causing the death of an employee of a railroad, the burden is on the plaintiff to show negligence of the railroad.

Error to Circuit Court, Clarke County.

Action by the administratrix of Alexander McDonald against the Norfolk & Western Railway Company. From a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

O'Flaherty & Fulton and *Robert F. Leedy*, for plaintiff in error.

Joseph I. Doran and *Marshall McCormick*, for defendant in error.

CARDWELL, J. This action was brought by the administratrix of Alexander McDonald to recover from the Norfolk & Western Railway Company damages for the alleged negligent killing of plaintiff's intestate. McDonald was a conductor in the employ of the defendant company, and had absolute and complete charge of a construction train, which was unloading, at the time of the injuries of which he died, 85-pound steel rails. The rails were loaded in a stock car, and had been shipped from the factory in that car, and had to be gotten out, and the question was how to get them out most conveniently and safely. The defendant company had adopted the preceding year the method of unloading these rails by means of a rope about 50 feet long with an iron or steel hook to each end. One hook was placed under the rail of the track, and the other was fastened in a bolt hole in the rail on the car. The train at the time consisted only of the engine and two stock cars, attached to the front of the engine; the engine in propelling the cars along the line of railway moving backwards. In unloading the rails, McDonald had the direction of the work to be done and the movement of the engine and cars backward and forward, and this, under the rules of the company, was his whole duty. When the rope was placed, as stated, with the hook on one end under the rail on the track and the other fastened in a bolt-hole in the rail on the car which at the moment was to be pulled out of the rear end of the car and thrown on the ground, the man who had placed the hook under the rail of the track, just as the engine had been signaled forward, discovering that it was straightening, cried out to McDonald "Whoa"; thereupon McDonald, who had himself placed the hook in the end of the rail in the car, and had stepped back from the car some eight or

*For the authorities in this series on the question whether a presumption of negligence on the part of the master arises from the fact that one of his servants is injured, see foot-notes appended to *Hemphill v. Buck Creek Lumber Co.* (N. Car.), 20 R. R. R. 411, 43 Am. & Eng. R. Cas., N. S., 411; foot-notes appended to *Fitzgerald v. Southern Ry. Co.* (N. Car.), 20 R. R. R. 368, 43 Am. & Eng. R. Cas., N. S., 368; foot-notes appended to *Northern Pac. Ry. Co. v. Dixon* (C. C. A.), 20 R. R. R. 242, 43 Am. & Eng. R. Cas., N. S., 242.

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ten feet, holding on to the rope with his right hand, signaled with his left hand to the man in charge of the engine to stop, and the engine was stopped, but before this was accomplished the hook under the rail pulled out and flying back in the direction of the car struck McDonald on the back of his head, inflicting an injury from which he died in a few moments.

The essential grievances stated in the declaration are that the defendant company failed to provide suitable and safe appliances to be used in the work required to be done on the occasion of this accident; that a sufficient number of competent employees to do this work was wanting; and that the method adopted by the defendant company for unloading the rails from the car was an unsafe method.

The jury found a verdict for the plaintiff, and assessed the damages at \$5,000, and thereupon the defendant company moved for a new trial upon the ground that the verdict was contrary to the law and the evidence, and for other reasons; but the court overruled the motion, and gave judgment for the plaintiff, to which action of the court the defendant company duly excepted, and the case is now before us for review upon a writ of error awarded the defendant company.

We are of opinion that in no aspect of the case, under the evidence adduced, was the plaintiff entitled to recover, and in this view it is unnecessary to consider any other assignment of error than the refusal of the court to set aside the verdict as contrary to the law and the evidence.

As we review the evidence it will clearly appear, we think, that if it were conceded that the engine in use at the time was out of order, its air brakes not working; that the fireman, who, at the time, was handling the engine, the engineer having necessarily to step aside, was incompetent to discharge the duties of an engineer; and that the defendant company did not have engaged in the work of unloading these rails a sufficient number of competent employees to do such work, there is not the slightest foundation for the contention that the unfortunate occurrence in which McDonald lost his life was brought about from either of those causes. Nor is it necessary to determine whether or not McDonald was at the time of his injury, at work in the line of his duties.

As stated in the outset, the rails being unloaded at the time were in a stock car, and had been shipped from the factory in that car, and a witness for the plaintiff, Waters, who was in the best position from which to have observed just what happened on the occasion when McDonald lost his life, after stating that the work of unloading the rails was simple, requiring no great art in the doing of it, that the rope and the hooks used were of sufficient strength and that the doing of this work could be learned in a few minutes, because it simply consisted of placing one hook in one place, and another hook in another place, and when that was accomplished the work was over and

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the employee got out of the path of danger, if there was any, describes the occurrence as follows: "Mr. McDonald was carrying the front end of the rope, and hooking under the rail under the car and was carrying the hind end of it, and put it under the rail under the track, and I always held my feet against the hook until the rail started out of the car always, to keep it from sliding out or anything, and I had my feet against the hook, and I felt it give under my feet, and I looked down and saw it was straightening out, and I looked at the car and saw that it wasn't coming out, and I hollered 'Whoa,' and Mr. McDonald gave the signal to the engineer to shut off, you know, and I felt the hook still giving under my feet, and I just took my eyes off and stepped off down on the ballast over the rail behind me, and when I looked up Mr. McDonald was going down the bank." This witness further states that the whole thing was done so quickly that he could not calculate it even in seconds, and that the rope and hooks at either end were of sufficient strength to do the work in which they were engaged. It further appears that the whole trouble grew out of the end of the rail catching on one of the stanchions or upright pieces of the car. It was the end of the rail in which McDonald had placed the hook, and if there was danger of the rail so hanging no one could have known it better than McDonald himself. When he was notified by Waters that something was wrong, he immediately signaled the man on the engine to stop, and this man (Koontz), who was examined as a witness, states that he did stop the engine, and upon cross-examination, though reluctantly, says that he stopped it immediately, his whole testimony being to the effect that it was stopped as soon, as instantaneously, as it could have been stopped if it had been in charge of the most experienced engineer, and equipped with the most improved appliances. But, be that as it may, we have this situation: When Waters, at the end of the rope, where he hooked it under the rail, discovered that the rail on the car was not coming out, that the rope had been stretched to its fullest capacity, and the hook under the rail straightening, he at once notified McDonald of the danger, and in a space of time which he could not count in seconds the injury to McDonald had been inflicted, and he had fallen over the bank where he expired immediately. It was done, says the witness, in the twinkling of an eye. There was no danger whatever in the situation, no neglect whatever of any duty which the defendant company owed to McDonald, until the man at the end of the rope hooked under the rail found the hook straightening out. The rope was then tight and straining upon the hook, and it was impossible for the man at the hook to signal McDonald, McDonald to transmit the signal to the engineman, and the engineman to stop the engine in time to prevent the accident. If the engine had been of the most improved type and equipped with the most improved appliances, it was a matter of physical

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impossibility for the accident under the circumstances, brought about in an instant of time, to have been avoided.

This is the case made in the record, by the uncontradicted evidence, and considered under the rule governing its consideration by this court.

The burden is upon the plaintiff to make out her case, which is in the first instance to establish the negligence of the defendant company, by affirmative evidence, which must show more than a mere probability of a negligent act. It is true that the proof need not be direct and positive by some one who witnessed the occurrence and saw how it happened, but it must be such as to satisfy reasonable and well-balanced minds that it resulted from the negligence of the defendant. *Consumers' Brewing Co. v. Doyle*, 102 Va. 399, and 46 S. E. 390, and authorities cited. There being nothing in the situation to suggest danger to any one until the moment when McDonald received his injury, it was an utter impossibility for the defendant company to have foreseen the danger, and guarded against it. If the accident had been anticipated, it could have been easily avoided, and by no one more easily than McDonald himself. If he, at the point where the danger originated, failed to foresee it in time to guard against it, it was impossible, as it seems to us, that the defendant company could have anticipated the danger and guarded against it. It has been repeatedly said by this court, with the sanction of innumerable cases decided by other courts, that it would violate every principle of justice or law, if a defendant, in an action to recover damages for injuries by an employer to his employee, were compelled to foresee and provide against that which reasonable and prudent men would not expect to happen.

It was a matter of pure speculation or conjecture, according to plaintiff's own evidence in this case, as to what the defendant company could or should have done to avoid the condition of things which arose in a moment of time, and which resulted in the injury to McDonald. The evidence fails utterly to point out any negligence on the defendant company's part which could be fairly considered as the proximate cause of this injury.

As said by this court in *N. & W. Ry. Co. v. Cromer*, 101 Va. 671, 44 S. E. 899: "The existence of negligence must not be left entirely to conjecture, and courts cannot uphold the tentative conclusions of juries, based upon no sure grounds of inference."

The evidence proves no more than that the occurrence, resulting in the injury and death of McDonald, was an accident pure and simple, for which the defendant company could not, either in law or justice, be held responsible.

We are therefore of opinion that the lower court erred in overruling the motion of the defendant company to set aside the verdict, and its judgment must be reversed, and the case remanded for a new trial.

BUCHANAN, J., absent.

ROBERTS v. SOUTHERN RY. CO.

(Supreme Court of North Carolina, Nov. 27, 1906.)

[55 S. E. Rep. 509.]

Master and Servant—Injuries Inflicted by Yardmaster—Scope of Employment.*—Where a servant of a railroad made a mistake in switching a train, and thereafter, but within a short time, the yardmaster spoke to him about the mistake, and a quarrel ensued, in which the yardmaster struck the servant, the test of the railroad's liability for the assault was not whether the act was done by the yardmaster while he was on duty or engaged in his duties, but whether it was done within the scope of his employment, and in the prosecution and performance of the business given him to do.

Appeal from Superior Court, Mecklenburg County; Bryan, Judge.

Action by T. J. Roberts against the Southern Railway Company. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

The evidence shows that plaintiff, an employee of the defendant, on its yard at Charlotte, was assaulted by one Bradley, the yardmaster, and plaintiff's superior. Plaintiff's account of the difficulty tended to show that plaintiff, having made some mistake in switching a train on to the wrong track, went into the office; and some time thereafter, and within a short time, Bradley, the yardmaster, came in and spoke to plaintiff about the mistake, and plaintiff called Bradley a "swell head," and the assault was then committed. Bradley's account was that he spoke to plaintiff about the mistake when it was made; and then he (Bradley) went into the office. That later, plaintiff came in, and commenced to quarrel with witness, and the fight followed. Bradley further testified that the assault was not at all serious, and both he and the plaintiff were off duty when it occurred. Plaintiff contended that though Bradley's successor may have been then on the yard and in charge, that Bradley had still continued to work, and was engaged in his duties at the time of the assault.

Plaintiff asked the court to charge that on the testimony, if believed, the jury should answer the first issue as to a wrongful assault "Yes," which was declined, and the plaintiff excepted. The plaintiff further asked the following special instructions: "That if the jury find from the evidence that Bradley, the servant of the defendant, while in the discharge of the work of the defendant company, assaulted the plaintiff, they will answer the first issue 'Yes.' Refused, except as given in the general

*For the authorities in this series on the question whether the master's liability for the negligence or torts of his servant depends upon whether the accident occurred while the servant was acting within the scope of his employment, see foot-notes appended to *St. Louis S. W. Ry. Co. v. Harvey* (C. C. A.), 20 R. R. R. 379, 43 Am. & Eng. R. Cas., N. S., 379.

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charge, and plaintiff excepts. That if the jury find from the evidence that the plaintiff was assaulted by Bradley, the servant or employee of the defendant; while the plaintiff was on duty doing the work of the defendant company, and that such assault was made by the servant Bradley in consequence of a dispute which arose over the manner in which plaintiff's work was being done or had been done, the jury will answer the first issue 'Yes,' although the jury may find that Bradley had been relieved for the time by the arrival of another yardmaster." Refused, except as given in the general charge, and plaintiff excepts. "That if the jury find that Mr. Blackwood had relieved Mr. Bradley from his duty as yardmaster before the difficulty commenced between the plaintiff and defendant's employee, Bradley, the defendant is nevertheless liable in damages for the assault of Bradley on the plaintiff, unless Bradley had actually quit his duties before he made the assault upon the plaintiff, about the defendant's business, and before he had actually gone off duty for the defendant, the jury will answer the first issue 'Yes.'" Refused, except as given in the general charge, and plaintiff excepts.

The court, among other things, charged the jury that where a servant does a wrong to a third person, the master must answer for the act if it was committed in the course and scope of the servant's employment, and in furtherance of the master's business. And, on the request of plaintiff, further charged that the defendant company is responsible in damages for the wrong done plaintiff by the employee of the defendant while such employee or servant was acting within the scope of his employment. And, in response to a prayer of the defendant, the court charged that if the jury find from the evidence that Bradley had been relieved from duty by the day yardmaster, Blackwood, before the fight occurred, the answer to the first issue should be "No." The plaintiff excepted to the refusal of the court to give his prayers for instructions and to the prayer given at the request of the defendant.

The jury answered the first issue as to wrongful assault "No." Judgment on the verdict for the defendant, and plaintiff excepted and appealed.

Morrison & Whittock, for appellant.

W. B. Rodman and *L. C. Caldwell*, for appellee.

HOKE, J. (after stating the case). The court, among other things, charged the jury as follows: "The court further charges you that where a servant does a wrong to a third person the master must answer for the act if it was committed in the scope and course of the servant's employment, and in furtherance of the master's interests." This is a correct general principle which has been frequently applied to different cases in this and other jurisdictions, and, on the facts disclosed by the testimony, are as favorable as plaintiff had any right to ask. *Jackson v.*

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Telegraph Co., 139 N. C. 347, 51 S. E. 1015, 70 L. R. A. 738; *Pierce v. Railway*, 124 N. C. 83, 32 S. E. 399, 44 L. R. A. 316. And the charge of the court below in giving the defendant's prayer for instructions, while not, under all circumstances, a definite or precise test of responsibility, as applied to the facts of this case, is in accord with the best-considered decisions. *Palmer v. Railway*, 131 N. C. 250, 42 S. E. 604.

Nor was any error committed in refusing plaintiff's prayer for instructions. They all embody the idea that if the assault was committed by Bradley while engaged in the performance of his duties, the company is, in any event, responsible. The court is confirmed in this interpretation of the prayers by the statement in the brief of plaintiff's attorney in connection with them, as follows: "We think that the true test is whether or not Bradley was still engaged in and about the duties pertaining to his position when the assault was committed." And we hold that this is not the correct principle. The test is not whether the act was done while Bradley was on duty or engaged in his duties; but was it done within the scope of his employment and in the prosecution and furtherance of the business which was given him to do? As held in *Sawyer v. Railroad* (N. C. at the present term) 54 S. E. 793, quoting from *Wood on Master & Servant*, § 307: The simple test is whether they were acts within the scope of his employment; not whether they were done while prosecuting the master's business, but whether they were done by the servant in furtherance thereof, and were such as may be fairly said to be authorized by him. By 'authorized' is not meant authority expressly conferred: but whether the act was such as was incident to the performance of the duties intrusted to him by the master even though in opposition to his express and written orders." And again from the same author at section 288: "An employer who leaves to an employee to do certain acts for him according to the employee's judgment and discretion is answerable for the manner or occasion of doing it; provided it is done bona fide and within the scope of the servant's express or implied authority and not from mere caprice or wantonness, and wholly outside of the duties conferred upon him." The distinction here dwelt upon is very well stated in *Mott v. Ice Co.*, 73 N. Y. 543, as follows: "For the acts of a servant in the general scope of his employment, while engaged in his master's business, and done with a view to the furtherance of that business and the master's interests, the latter is responsible whether the act be done negligently, wantonly, or even willfully. The quality of the act does not excuse. But if the employee, without regard to his service, or to accomplish some purpose of his own, act maliciously or wantonly, the employer is not responsible." And the general doctrine on the subject is fully considered in the case of *Daniel v. Railroad*, 136 N. C. 527, 48 S. E. 816, 67 L. R. A. 455.

The error in plaintiff's position, as contained in the prayers for instructions, is that they make the responsibility depend on

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whether the act was done by Bradley, the yardmaster, while engaged in his duties; and leave entirely out of consideration the questions whether the act was done in the scope of Bradley's employment, and in prosecution and furtherance of the powers entrusted to him, and whether it was not an independent tort on the part of Bradley; in which case, the employer is not responsible. Jaggard, vol. 1, 279. The same author says, at page 279: "The question of what is or is not an independent tort of the servant cannot, it seems, be referred to any definite rule, but is ordinarily a question of fact for the jury." Applying these rules to the facts of the case before us, there has been no error committed which gives the plaintiff any ground of complaint.

While the testimony differs considerably on the merits of the controversy as between plaintiff and Bradley, there is no substantial difference as to the facts which do or do not tend to inculcate the defendant company. Both plaintiff and defendant testify that the conduct of plaintiff in changing, or failing to change, the switch had passed at the time of the quarrel. Whether plaintiff went into the office, and Bradley afterwards came in; or Bradley went into the office, and was later followed by plaintiff, does not affect the question in this aspect of the case. Both statements show that the conduct of plaintiff about the switch as a physical act was a closed incident; and that, at the time, Bradley was neither directing plaintiff about his work nor giving him instructions about it for the future; nor even physically correcting him about it in the past. It was simply a quarrel that two employees had about a past event in which Bradley was clearly acting of his own mind and will as an independent agent, and in which plaintiff is not at all free from fault. There is no error, and the judgment below is affirmed.

No error.

RICKER v. CENTRAL R. CO. OF NEW JERSEY.

(Court of Errors and Appeals of New Jersey, Nov. 19, 1906.)

[64 Atl. Rep. 1068.]

Master and Servant—Who Are Fellow Servants.*—A train dispatcher of a railroad company, whose duty is to issue telegraphic orders for the movement of trains upon a single track road, in the name of the superintendent, and to see that they are transmitted, is not a fellow servant of a fireman upon one of the locomotives of the company.

Gummere, C. J., and Garrison, Hendrickson, Pitney, Reed, Gray, and Dill, JJ., dissenting.

(Syllabus by the Court.)

*For the authorities in this series on the question whether train dispatchers and telegraph operators are fellow servants of other railroad employees, see foot-notes appended to *Northern Pac. Ry. Co. v. Dixon* (C. C. A.), 20 R. R. R. 242, 43 Am. & Eng. R. Cas., N. S., 242; foot-notes appended to *Choctaw, etc., Ry. Co. v. Doughty* (Ark.), 18 R. R. R. 665, 41 Am. & Eng. R. Cas., N. S., 665.

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Error to Supreme Court.

Action by John H. Ricker against the Central Railroad Company of New Jersey. Judgment for plaintiff. Defendant brings error. Affirmed.

See 61 Atl. 89.

W. D. Edwards and *George Holmes*, for plaintiff in error.

Louis H. Schenck, for defendant in error.

SWAYZE, J. The plaintiff, a fireman on train 30, south bound, on a branch of the defendant railroad, was injured in a collision with train No. 31, north bound, one mile south of Hoffman's station. The trial judge allowed the case to go to the jury only upon the question of negligence on the part of the train despatcher at High Bridge, the junction point of the branch road with the main line. Two questions are therefore presented on this writ of error: (1) Was the negligence of the train despatcher the negligence of the company, so as to preclude the application of the rule that denies recovery for injuries caused by the negligence of a fellow servant? (2) If so, was there evidence of negligence sufficient to justify the submission of the case to the jury?

The general principle well established in the cases is that the master is bound to take reasonable care that the place where the workmen are engaged shall be kept safe (*Belleville Stone Co. v. Mooney*, 61 N. J. Law, 253, 39 Atl. 764, 39 L. R. A. 834), and if the master selects an agent to perform this duty for him, and the agent fails to exercise reasonable care and skill in its performance, the master is responsible for the fault. (*Steamship Co. v. Ingebregsten*, 57 N. J. Law, 400, 31 Atl. 619, 51 Am. St. Rep. 604. The master is held liable in a proper case because the negligence is regarded by the law as his negligence. Where the negligence consists merely in the failure of the agent to perform a duty properly intrusted to him by the master, the master cannot be held liable by virtue of the rule *respondeat superior*, for the application of that rule is prevented by the well-established exception which exempts the master from liability to a servant for injuries resulting from the negligence of a fellow servant. In applying the general principles to the fact of a particular case, it often becomes difficult to determine whether the negligence in question is to be regarded as the negligence of the master or of the servant alone, and various tests to determine this question have been suggested. In this state we have rejected the theory which holds the master liable merely because the negligent servant is in charge of a separate department or is superior in rank to the one injured. (*Knutter v. Telephone Co.*, 67 N. J. Law, 646, 52 Atl. 565, 58 L. R. A. 808. In *Baltimore & Ohio R. R. Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, 37 L. Ed. 772, it was said that the question turns rather on the character of the act than on the relation of the employees to each other. This test had already

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been adopted in our Supreme Court (*Smith v. Oxford Iron Co.*, 42 N. J. Law, 467, 474, 36 Am. Rep. 535), where Justice Van Syckel said that the neglect to perform those duties which devolve upon the company should be regarded as the neglect of the company itself, and was adopted by this court in *Smith v. Erie R. R. Co.*, 67 N. J. Law, 636, 52 Atl. 634, 59 L. R. A. 302. In *Steamship Co. v. Ingebregsten*, Justice Dixon said, with reference to the inspection and repair of apparatus, that a rational distinction would seem to be that when the employee's duty to inspect and repair is incidental to his duty to use the apparatus in the common employment, then he is not intrusted with the master's duty to his fellow servant, and the master is not responsible to his fellow servant for his fault, but that, if the master has cast a duty of inspection or repair upon an employee who is not engaged in using the apparatus in a common employment with his fellow servant, then that employee in that duty represents the master, and the master is chargeable with his default. Both of these tests—the character of the act, and its incidental feature—are useful tests, but there is nothing in the cases cited to indicate that there may not be other tests, also. The question to be determined is whether, under all the circumstances of the particular case, the servant is to be regarded as the alter ego of the master. It may be that the master has intrusted him with such control over the general conduct of the business that he must be regarded as standing in the master's shoes. This is especially likely to be the case with a corporation, which can act only through agents, as was suggested in *Smith v. Oxford Iron Co.*, 42 N. J. Law, 467, 36 Am. Rep. 535, and in *O'Brien v. American Dredging Co.*, 53 N. J. Law, 291, 21 Atl. 324. In such cases the liability of the master depends upon whether he has intrusted the servant with such control as is properly the business of the master.

We think the facts in the present case necessitate an inference that the train despatcher was the alter ego of the defendant. It will hardly be denied that the duty of a railroad company to take care that the place in which its employees are to work shall be reasonably safe required the company to prepare a schedule or time table for the running of its trains. Such a schedule is absolutely essential in order that the system adopted by the company for the conduct of its business may be reasonably safe. When that schedule breaks down, it may be under such circumstances that a new schedule to meet the emergencies can be made by the train hands themselves; as, for instance, when a train is delayed and the engineer makes up time by running faster than his ordinary schedule. But when the railroad is a single track and it becomes necessary for the company to require information to be given to a central authority, who is empowered to direct the movements of all trains, his orders for that purpose amount to a new emergency schedule. We agree with the Court of Appeals in New York

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that the preparation of that schedule is a positive duty of the master. *Hankins v. New York, L. E. & W. R. R.*, 142 N. Y. 416, 37 N. E. 466, 25 L. R. A. 396, 40 Am. St. Rep. 616. The work is not merely incidental, as was the duty of the brakeman to signal the oncoming train in *Miller v. Central R. R. Co.*, 69 N. J. Law, 413, 55 Atl. 245. What chiefly distinguishes the train dispatcher's work in the present case is that by the company's rule it was made his duty to issue telegraphic orders for the movements of trains in the name of the superintendent, and to see that they were transmitted and recorded in the manner prescribed. This duty in the present case required him to issue orders to three different trains miles apart, and might sometimes require orders to many trains scattered along the company's whole line. Such work as that pertains to the master, the natural directing head. The train dispatcher is not merely a superior servant, like the foreman of a gang of workmen. It is to be conceded, as we think it must be, that the duty to prepare a time table is the company's duty. The duty is not discharged by preparing a time table once for all, accompanied by rules regulating variations therefrom. The duty to exercise reasonable care is continuous, and the need of a time table to direct the movement of trains is constant. Upon the question whether this duty is a positive one resting on the master, we can see no distinction between this case and the case of *Smith v. Erie R. R.*, 67 N. J. Law, 636, 52 Atl. 634, 59 L. R. A. 302. It is quite as much the master's duty to keep the time table up to date as to keep the roadbed in repair. Both are equally essential to the servant's safety. The courts of 14 of our sister states and the federal courts, including courts which rest the liability of the master upon the same ground as our own cases, have reached the same result. The cases have been recently diligently collected by Mr. Justice Chase of New Hampshire, in *Wallace v. Boston & Maine R. R.*, 72 N. H. 504, 57 Atl. 913. It would serve no useful purpose to repeat the citations. To them may be added the recent case of *Santa Fe Pacific Railroad Co. v. Holmes*, 202 U. S. 438, 26 Sup. Ct. 676, 50 L. Ed. 1094. The courts of Maryland and Mississippi seem to stand alone in the other view, and their reasoning does not commend itself to us. We do not rest our view upon the fact that the train dispatcher is superior in rank to the fireman of a locomotive. We can conceive of cases where the company would not be responsible for his negligence. Perhaps *Reiser v. Pennsylvania Co.*, 152 Pa. 38, 25 Atl. 175, 34 Am. St. Rep. 620, may be regarded as such a case. There it was held that the knowledge of the train dispatcher that a station agent and telegraph operator, whose negligence caused the accident, was incompetent, did not make the company liable. We rest the defendant's liability in this case upon the character of the work of the train dispatcher in regulating the movement of trains.

In order to determine whether there was sufficient evidence

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to justify a submission of the case to the jury, a rather full statement of the facts proved is necessary. Three trains are involved. No. 30 and No. 52 were south-bound trains, and by the rules of the company had the right of way. No. 31 was a north-bound train. According to the time table No. 52 should have reached the terminus at High Bridge at 9:40 a. m., 10 minutes before the departure of No. 31, and No. 30 and No. 31 should have met at Hoffman's, 3.9 miles north of High Bridge. On the morning of the collision No. 52 was detained and considerably behind time. At 9:43 a. m., three minutes after No. 52 was due at High Bridge, the train despatcher issued an order directing 52 and 31 to meet at Hoffman's. This order reached the telegraph operator at Califon, 1½ miles north of Hoffman's, and he put out a signal to stop the south-bound train. In the meantime, No. 30 had passed No. 52, which was on a switch at Vernoy a little more than a mile north of Califon. By the rules of the company a train overtaking another train of the same or superior class, disabled so that it cannot move, will run around it, assuming the rights and taking the orders of the disabled train to the next telegraph office which is open, where it will report to the superintendent. The next telegraph office after No. 30 had passed No. 52 was Califon. At that point train No. 30 offered to stop, but the station agent and telegraph operator signaled to go ahead, and gave the train conductor a clearance card, which read as follows: "I have no orders for your train. Signal is out for 52." It was then about 10:20 a. m. No. 30 was due at Califon at 10:01, and being a south-bound train had the right of way. At 9:43 the conductor of No. 31, then waiting at High Bridge, received the order directing him to meet No. 52 at Hoffman's. At that time, according to the time table, No. 30 should have been fifteen minutes north of Vernoy. The conductor of No. 31 asked the train despatcher if No. 30 was ahead of No. 52 and was assured that it was not. When No. 31 was ready to leave High Bridge, the conductor saw the order board red, which meant there were orders for him, and he started to the office to see what the trouble was, but as he got in sight of the office the yardmaster and the train despatcher both gave him the regular hand signal, the regular day signal, to go ahead, and he started with his train at 10:15 or 10:16. The road was a single track, and the result was a head-on collision one mile south of Califon at 10:28. The train despatcher had been inquiring about No. 52 of the telegraph operator at Califon for half or three-quarters of an hour prior to the arrival of No. 30 at Califon, but is not shown to have made any inquiry as to No. 30. Under these circumstances we think that it was a question for the jury whether the train despatcher was negligent in allowing the time from 9:43 to 10:15 to elapse without any further orders, although he must be presumed to know from the time table that No. 30 was due at Hoffman's at 10:10, five minutes before he ordered

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No. 31 out of High Bridge, and might have passed No. 52, which was then at least 50 minutes behind time, for it was due at Califon at 9:25. It is true the witnesses testified that No. 30 had no right to pass No. 52 at Vernoy, but they also said it frequently did pass. No. 30 was due at Califon at 10:01. We think it was a question for the jury whether the care necessary in directing the movements of trains upon a single track road did not require new orders. The order of 9:43 a. m. was adapted to the conditions existing at the time, but not to the condition 32 minutes later. At the time No. 31 was ordered out of High Bridge it did not have full schedule time to make the meeting point at Hoffman's and could not leave without special orders. The fact that a special order was necessary would naturally suggest to the train despatcher that the operator at Califon be notified that such order had been given to No. 31. To make a special order accomplish its purpose, it seems reasonable that it should be communicated to all trains likely to be affected, and not to one alone. Such was the course adopted with the order of 9:43 a. m. If the same course had been adopted with the order given No. 31 at 10:15 the accident might have been averted, for four or five minutes elapsed before No. 30 left Califon, a time long enough to enable notice to be sent to the operator at Califon. We think it was also a fair question whether the train despatcher was not negligent in ordering No. 31 to leave High Bridge at a time when No. 30, by the time table, ought to have passed Hoffman's without making inquiry as to the whereabouts of No. 30, especially as No. 30 had the right of way. It may be said that the operator at Califon ought to have known that the order as to No. 52 was applicable to No. 30, since the latter had passed No. 52, and ought to have reported No. 30's arrival before giving the clearance card. We incline to think he ought to have done so. It may also be said that the conductor of No. 30, before acting upon the clearance card, should have waited for the operator at Califon to report his arrival and receive further orders, although it is to be said in his defense that he may well have thought that such a report had been made, for his train could be seen for 300 or 400 yards before it reached Califon and was running so slowly that the operator had time to make the clearance card after he saw the train coming. But, even if the operator at Califon and the conductor of No. 30 were negligent, the question would still remain whether, under all the circumstances of the case, the train despatcher exercised reasonable care in depending upon their accepting an order issued for No. 52 32 minutes before, as an order still obligatory on No. 30. Ought it not to have occurred to him that they might possibly think, as they probably did think, that the order to No. 52 did not apply to No. 30, and that No. 31 would be held at High Bridge until No. 30 reached that point, especially as the train despatcher up to 10:15 is not shown to have made any

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inquiry as to No. 30, although her regular time for leaving Califon had passed? If the accident was caused by the negligence of the operator at Califon and of the conductor of train No. 30 co-operating with the negligence of the train despatcher, the defendant is nevertheless liable. *Cole v. Warren Mfg. Co.*, 63 N. J. Law, 626, 44 Atl. 647; *Flanigan v. Guggenheim Smelting Co.*, 63 N. J. Law, 647, 44 Atl. 762; *Campbell v. Gillespie Co.*, 69 N. J. Law, 279, 55 Atl. 276.

We find no error, and the judgment must be affirmed.

GUMMERE, C. J., and GARRISON, HENDRICKSON, PITNEY, REED, GRAY, and DILL, JJ., dissent.

ABLE v. SOUTHERN RY. et al.

(Supreme Court of South Carolina, Jan. 5, 1906.)

[52 S. E. Rep. 962.]

Master and Servant—Joint Torts.*—A master and servant are jointly liable for the willful tort of the servant committed in the scope of his employment.

Removal of Causes—Sham Defendant.*—In an action against a master for willful tort committed by his servant in his employment, the servant is a proper party, and the case is not removable to the United States court on the theory that he is a sham defendant.

Trial—Calendars—Hearing of Demurrer.—Though Code Civ. Proc. 1902, § 279, par. 2, provides for three calendars, and distinguishes the causes which shall be placed on each, and a demurrer should be heard on a different calendar from that on which issues of fact to be tried by a jury are placed, where a demurrer to a pleading in a cause properly on calendar No. 1 because of issues of fact to be tried by a jury is heard without a transfer to calendar No. 2, it is a mere irregularity, not affecting the jurisdiction and affording no sufficient ground for reversal.

Appeal from Common Pleas Circuit Court of Lexington County; Purdy, Judge.

Action by Mary E. Able, administratrix of Oliver C. Able,

*For the authorities in this series on the question whether a railroad company is liable for the willful or malicious torts of its employees, see foot-notes appended to *Sharp v. Erie R. Co.* (N. Y.), 19 R. R. R. 683, 42 Am. & Eng. R. Cas., N. S., 683; foot-notes appended to *Chicago, etc., Ry. Co. v. Kerr* (Neb.), 19 R. R. R. 369, 42 Am. & Eng. R. Cas., N. S., 369; foot-notes appended to *Baltimore & O. R. Co. v. Deck* (Md.), 18 R. R. R. 641, 41 Am. & Eng. R. Cas., N. S., 641; foot-notes appended to *Robertson v. Louisville & N. R. Co.* (Ala.), 18 R. R. R. 61, 41 Am. & Eng. R. Cas., N. S., 61; *Peterson v. Middlesex, etc., Co.* (N. J.), 15 R. R. R. 672, 38 Am. & Eng. R. Cas., N. S., 672.

For the authorities in this series on the subject of the right to remove cause to federal court because of diversity of citizenship, see foot-notes appended to *Illinois Cent. R. Co. v. Proctor* (Ky.), 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531.

Personal liability of agents or servants to third persons for injuries from negligence, see extensive note, 20 R. R. R. 457, 43 Am. & Eng. R. Cas., N. S., 457.

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against the Southern Railway and James Alexander. From an order refusing to remove cause to the United States court. defendants appeal. Affirmed.

B. L. Abney, E. M. Thomson, and R. H. Welch, for appellant.

G. T. Graham and J. Wm. Thurmond, for respondent.

WOODS, J. This action was brought by the administratrix of Oliver C. Able for \$21,000 damages for his death by the alleged wrongful acts of the defendant railway company and its codefendant Alexander. The complaint alleges that the defendant railway company is a corporation duly created and existing under the laws of the state of Virginia, and owned and operated a railroad running through the town of Leesville, in the county of Lexington, in this state; that the defendant Alexander was a servant in its employ as engineer of its passenger locomotive engine which struck and killed plaintiff intestate and operated the same. The allegations of the complaint which allege the joint tort and which are material to this appeal is as follows: "That on or about the 13th day of December, 1903, the said Oliver C. Able, deceased, plaintiff's intestate herein, was struck and killed at a public crossing, and traveled place within the corporate limits of the town of Leesville, in the county of Lexington and state of South Carolina, by a locomotive engine with a train of passenger cars attached thereto, operated, controlled and managed by the defendants. And the plaintiff alleges that the death of her intestate, the said Oliver C. Able, was caused by the joint and concurrent, negligent, reckless, and wanton conduct and management of the said locomotive engine by the defendants, in that said defendants ran said locomotive and train of cars on and over said railroad track and in the corporate limits of the said town of Leesville at a negligent and reckless rate of speed, and caused said locomotive engine and train of cars to approach the public crossing in Green street, in the town of Leesville aforesaid, the place at which plaintiff's intestate was walking, at a negligent and reckless rate of speed, and then and there negligently, recklessly, wantonly, and willfully caused said locomotive engine to strike and kill plaintiff's intestate, that while plaintiff's intestate was in plain view of the defendants and was actually seen by him in ample time for them to have avoided injuring him, and while plaintiff's intestate's back was toward the said locomotive and train of cars which was approaching the plaintiff's said intestate at said public crossing, and while the defendants saw and knew the perilous position of her said intestate and could easily have avoided injuring him, but regardless of their duty in that respect, and regardless of the rights of the plaintiff's intestate, and in utter disregard of human life, and without ringing the bell or sounding the whistle of said locomotive, and without observing any care or caution whatsoever, the said defendant

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ran said locomotive engine and train of cars over said railroad track within the corporate limits of the town of Leesville aforesaid at a negligent and reckless rate of speed, and then and there negligently, recklessly, and wantonly caused said locomotive engine to strike and kill plaintiff's said intestate at said public crossing on said railroad track as he was in the act of stepping off of said railroad track at said public crossing."

Within due time, on April 27, 1904, the defendant Southern Railway Company filed its petition and bond for the removal of the cause to the Circuit Court of the United States for the District of South Carolina. The railway company on April 28th also answered the complaint, denying its allegations, and pleading contributory negligence. On the same day the defendant Alexander demurred to the complaint on the ground that it failed to state facts sufficient to constitute a cause of action against him. On the call of the cause on calendar No. 1, Hon. R. O. Purdy, the presiding judge, refused the petition for removal, and the appeal involves chiefly the correctness of this ruling. As stated in the appellants' argument, the petition of the railway company for removal alleges (1) that the complaint averred no fact to charge the defendant railway company with participation in alleged willful and wanton acts of its codefendant Alexander and showed a separable controversy; and (2) upon information and belief that its codefendant Alexander was made defendant to the suit, under the allegation that he is a resident and citizen of the state of South Carolina, solely for the purpose of preventing the removal of the cause to the United States court, and that he is merely a nominal or sham defendant and not a necessary or indispensable party to the action, that the said codefendant cannot be made to respond to any judgment that may be had against him in the cause, and that the petitioner does not believe it is intended eventually to obtain a judgment against him.

The first ground was not urged in the argument for the reason, no doubt, that the conclusive opinion of the circuit judge is fully sustained by the cases of *Schumpert v. Ry. Co.*, 65 S. C. 332, 43 S. E. 813, 95 Am. St. Rep. 802; *Carson v. Ry. Co.*, 68 S. C. 55, 46 S. E. 525; *Id.*, 194 U. S. 136, 24 Sup. Ct. 609, 48 L. Ed. 907. Under these authorities the master and servants are jointly liable for the willful tort of the servant committed in the scope of his employment while in the master's service.

The application of this principle also disposes of the second ground. If a tort was committed, and the defendant Alexander is responsible therefor jointly with the railway company, he is a proper party to the action, and is in no legal sense a sham defendant because a judgment could not be collected from him for lack of property. No one can be a sham defendant who is legally liable in the action. It is not averred in the petition that the facts alleged in the complaint constituting the cause

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of action against Alexander and giving the state court jurisdiction are not stated in good faith, but pretensively, as, for example, that Alexander is known to the plaintiff not to be a resident of the state, or not to have been the engineer in charge of the locomotive, and was fraudulently made a party to defeat the right of the railway company to have the cause removed. The view of the defendant railway company that, though Alexander may be jointly liable as a matter of fact and law, yet he was a sham defendant, because the plaintiff, as defendant believes, does not expect to collect her money from him, but from the railway company, is erroneous. If all this were proved, it could not confer upon Alexander or any one else the right to have the action against him dismissed. The following clear statement of the principle under consideration made by Chief Justice Fuller in the beginning of the opinion in *Chesapeake & Ohio Ry. Co. v. Dixon*, 179 U. S. 131, 135, 21 Sup. Ct. 67, 45 L. Ed. 123, is conclusive: "The question to be determined is whether the Court of Appeals of Kentucky erred in affirming the action of the Boyd circuit court in denying the application to remove. And that depends on whether a separable controversy appeared on the face of plaintiff's petition or declaration. If the liability of the defendants, as set forth in that pleading, was joint, and the cause of action entire, then the controversy was not separable as matter of law, and plaintiff's purpose in joining Chalkley and Sidles was immaterial. The petition for removal did not charge fraud in that regard, or set up any facts and circumstances indicative thereof, and plaintiff's motive in the performance of a lawful act was not open to inquiry." *Carson v. Railway Co.*, *supra*; *Powers v. Railway Co.*, 169 U. S. 92, 18 Sup. Ct. 264, 42 L. Ed. 673.

From the foregoing discussion it is also obvious that the complaint states a cause of action against the engineer Alexander, and his demurrer was properly overruled. He insists, however, that, as the cause had not been docketed on calendar No. 2, the circuit judge was without jurisdiction to hear the demurrer against his objection upon the call of the case on calendar No. 1. The second paragraph of section 279 of the Code of Civil Procedure of 1902, provides specifically for three calendars, and distinguishes the causes to be placed on each. A demurrer should, in the regular conduct of the business of the court, be heard on a different calendar from that on which issues of fact to be tried by a jury are placed. When there has been a demurrer to a pleading in a cause properly docketed on calendar No. 1, because the issues of fact are for trial by a jury, if the cause has not been also docketed on calendar No. 2 for the hearing of the demurrer, either party may move to have it docketed on calendar No. 2 for the hearing of the demurrer. *Threatt v. Brewer Co.*, 42 S. C. 92, 19 S. E. 1009. In this case the defendant merely objected to hearing the demurrer on calendar No. 1, but made no motion to docket on calendar No. 2.

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There was no showing that the defendant was taken by surprise or was deprived of a full hearing, and hence hearing the demurrer on calendar No. 1 was at most an irregularity in no wise affecting the jurisdiction and affording no sufficient ground for reversal. *Ward v. Telegraph Company*, 62 S. C. 274, 40 S. E. 670.

The judgment of this court is that the orders appealed from be affirmed.

LOUISVILLE & N. R. CO. v. EADEN.

(Court of Appeals of Kentucky, May 9, 1906.)

[93 S. W. Rep. 7.]

Railroads—Operation—Accidents at Crossings—Action for Injury—Pleading.—A complainant alleging that, while plaintiff was standing "at or near" a private crossing of the defendant's road which was appurtenant to the farm, a part of which plaintiff's husband was occupying as tenant, one of defendant's trains passed along, and that the fireman recklessly, negligently, and wantonly threw a shovelful of burning cinders, embers, and ashes into her face, inflicting on her serious burns and permanent injury to her eyesight, from which she has suffered great injury and damage, is sufficient to withstand a general demurrer, as well as a motion in arrest of judgment after verdict, where it was further alleged that the fireman knew she was on the crossing at the time he threw out the embers and coals.

Same—Willful or Wanton Injury.*—Where a railroad fireman knows of the presence of a person on a crossing of the right of way, his act in recklessly, negligently, and wantonly throwing from a shovel burning cinders on her from a passing train renders the railroad liable for the injuries sustained, irrespective of whether she stood "at" or "near" the crossing, as alleged in the complaint.

Appeal—Review—Verdict.—The findings of the jury on disputed questions of fact are conclusive on appeal, when the verdict is not flagrantly contrary to the weight of the evidence.

Damages—Personal Injuries.—In an action for injuries to plaintiff's eyes, where there were no burns or scars on her face, and nothing to show that she might not soon be cured if her eyes were properly treated, the mere fact that she had chronic sore eyes would not warrant damages predicated on permanent injury to her eyes.

Same—Exemplary Damages.†—Exemplary damages are recoverable for injuries resulting from gross negligence.

Appeal from Circuit Court, Hopkins County.

"To be officially reported."

Action by Annie Eaden against the Louisville & Nashville Railroad Company. From a judgment in favor of plaintiff,

*For the authorities in this series on the question whether a railroad company is liable for the willful or malicious acts of its employees, see preceding case, and foot-notes.

†For the authorities in this series on the question when exemplary or punitive damages are, and are not, recoverable, see foot-notes appended to *Yazoo & M. V. R. Co. v. Sanders* (Miss.), 19 R. R. R. 656, 42 Am. & Eng. R. Cas., N. S., 656; *Atchison, etc., Ry. Co. v. Ringle* (Kan.), 19 R. R. R. 192, 42 Am. & Eng. R. Cas., N. S., 192.

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defendant appeals. Reversed, for proceedings consistent with opinion.

Clifton J. Waddill and *Benjamin D. Warfield*, for appellant.
Yost & Laffoon, for appellee.

BARKER, J. The appellee, Mrs. Annie Eaden, alleged in her petition that in September, 1903, while she was standing at or near a private crossing of the Louisville & Nashville Railroad Company, in Hopkins county, Ky., which was appurtenant to the farm a part of which her husband was occupying as tenant of W. P. Nesbet, one of appellant's trains passed along, and the fireman "recklessly, negligently, and wantonly" threw a shovelful of burning cinders, embers, and ashes into her face, inflicting upon her serious burns and permanent injury to her eyesight, from which she has suffered great injury and damage, and for which she prayed judgment in the sum of \$5,000. The appellant corporation by its answer placed all of the material allegations of the petition in issue, and, the case having been tried by a jury, a verdict was returned in favor of the appellee for the sum of \$2,500, of which the corporation now complains.

The court, on the trial, instructed the jury as follows: "(1) The court instructs the jury that if they believe from the evidence that a locomotive fireman, an employee of the defendant, while engaged in the discharge of his duties as such fireman, did negligently throw live coals or hot embers from one of its engines while said engine was passing a private crossing on W. A. Nesbet's farm, and that the plaintiff was at the time standing upon the said crossing for the purpose of passing over the same, and that the said fireman knew, or by the exercise of ordinary care would have known, when he threw said coals or embers, of the presence of the plaintiff upon the crossing, and of the danger, if any, that would or might result to the plaintiff from such coals or embers, and that such coals or embers struck the plaintiff and burned her forehead, eyes, cheeks, or nose, to her injury, they will find for the plaintiff; but, if the jury from the evidence believe to the contrary upon any of these propositions, they will find for defendant. (2) If the jury find their verdict for the plaintiff, they will award her such sum in damages as will reasonably compensate her for any mental or physical pain or suffering endured by her as the direct result of the injury, if any, shown by the evidence; and if the jury further believe from the evidence that the plaintiff's injury is permanent, they may award her such further sum as will reasonably compensate her for any reduction of her power to earn money, if any, shown by the evidence, as the direct result of the injury; and if the jury further believe from the evidence that the negligence of the defendant's fireman was gross, they may, in addition to compensatory damages, award the plaintiff exemplary damages in any sum in their discretion,

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but in all not to exceed \$5,000, the sum claimed in the petition.

(3) Negligence is the failure to exercise ordinary care. Ordinary care is such care as a person of ordinary prudence would usually exercise under same or similar circumstances. Gross negligence is the absence of slight care."

After the verdict was rendered appellant entered a motion in arrest of judgment, which was overruled. This ruling of the court is now urged as a ground of reversal. It is also insisted that the judgment is contrary to the evidence; that the second instruction, which contains the measure of damages applicable to the case, is erroneous, in that it permits the jury to find damages for the permanent injury of appellee, when there is no evidence in the record of such permanent injury having been inflicted, and that it permits the jury to find punitive damages against the appellant, which is unwarranted by the evidence adduced upon the trial. Of these in their order.

The trial court properly overruled the general demurrer to the petition, and also properly overruled the motion in arrest of judgment after verdict. It is true appellee alleges she was "at or near" the private crossing at the time she was injured, but she also alleges in another part of her petition that the fireman knew she was on the crossing at the time he threw out the embers and coals which she claims inflicted the injury to her eyes. We recognize the soundness of the rule that pleadings will be construed most strongly against the pleader, and, if there was any difference in the legal rights of appellee if she stood "at," instead of "near," the crossing, the allegation must be construed to place her at the point most to her disadvantage. But it is too well settled to require argument that, if the employee of appellant knew of appellee's position on the right of way of the corporation, he was then bound to exercise at least ordinary care to avoid injuring her. It is immaterial, therefore, whether she stood at or near the crossing. In either case, if the employee knew of her danger, the corporation is liable.

We do not think this case is controlled by the principle enunciated in *Louisville & Nashville R. R. Co. v. Routt*, 76 S. W. 513, 25 Ky. Law Rep. 887, and *Sullivan v. Louisville & Nashville R. R. Co.*, 115 Ky. 447, 74 S. W. 171, 103 Am. St. Rep. 330. In both of these cases it was distinctly held—and it was the turning point in the opinions—that at the time the injury complained of was inflicted the employees were not in the exercise of any duty they owed to their employers. In the first, the fireman wantonly threw a lump of coal at the plaintiff, who was walking along by the side of the track, and severely injured him. In the second, the employees of the corporation were merely playing a prank with a torpedo, which exploded, injuring the plaintiff. A different state of facts exists in the case at bar. Here, if appellee's testimony be true, the fireman was engaged in throwing out ashes and embers from the engine, thus discharging a duty he owed his employer, and if,

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while so doing, he recklessly and wantonly injured her, we see no reason for exempting the corporation from liability for the wrongful act of its employee.

Nor are we prepared, from all the evidence in this case, to say that the verdict is so flagrantly contrary to the weight of the evidence as to warrant a reversal of the judgment on that ground. The jury constitutes the tribunal established by law to try disputed questions of fact, and they are peculiarly adapted to perform this duty. The personality of the witness counts for much on such occasions, and conviction as to truth does not depend on the number of witnesses or their station in life. The appearance and deportment of one witness may make his testimony outweigh that of a dozen others, and therefore we cannot say that our opinion on the facts should be substituted for that of the jury, who saw and heard the witnesses.

We are, however, of opinion that the trial court erred in authorizing the jury to find damages predicated upon the permanent injury of appellant's eyes. A careful reading of the record fails to disclose to our satisfaction evidence sufficient to warrant a submission of the question of the permanency of appellee's injury. It is true she has chronic sore eyes; but there are no burns or scars on her face, and nothing to show that she may not soon be cured, if her eyes are properly treated. *Louisville Southern R. R. Co. v. Minogue*, 90 Ky. 369, 14 S. W. 357, 29 Am. St. Rep. 378.

The instruction as to the exemplary damages was correct. If appellee's statement is true with reference to the manner in which she was injured, the negligence of the employee was gross almost to the point of wantonness.

For the reasons given, the judgment herein is reversed, for proceedings consistent with this opinion.

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(Supreme Court of Illinois, Oct. 23, 1906.)

[79 N. E. Rep. 128.]

Railroads—Persons Near Track—Negligence — Evidence. — Defendant's servants, switching out a caboose with no one thereon, permitted it to be kicked on a downgrade track to a switch where it struck an engine, killing the plaintiff's intestate standing by. It was customary to have an employee on a caboose so running loose and a brakeman unsuccessfully tried to catch this one. Held sufficient to take to the jury the question of the negligence of defendant's servants.

Same—Contributory Negligence.—A person required by his duty to stand near a switch was killed in a collision caused by a caboose running from one track to the other and there striking an engine. He had no notice of the approaching caboose until too late to get out of the way. Held sufficient to take to the jury the question of the absence of contributory negligence.

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Master and Servant—Fellow Servants—Submitting Interrogatory—Effect.—The question of law as to whether those by whose negligence another was killed were fellow servants of the deceased is not foreclosed to defendant by the submission of a special interrogatory on the subject, after the refusal of a peremptory instruction and a finding that they were not.

Same—Separate Masters—Common Superior.*—Servants in charge of a caboose, the negligent switching of which in the yards of another company killed a switchman employed by such other company, are not rendered fellow servants of the switchman by the mere fact that the yardmaster of the company owning the yard directed on what tracks the cars of outside companies might be operated.

Trial—Instruction—Assumption of Fact.—An instruction that, to constitute defendant's servants and deceased fellow servants so as to exempt defendant from liability for its servant's negligence ("provided you believe from the evidence deceased's death was caused by the negligent acts of such servants"), certain circumstances must exist is not open to the objection that it assumes that the death was due to the negligence of defendant's servants.

Master and Servant—Instructions.—The instruction is not objectionable for failing to include a statement as to the necessity of the absence of contributory negligence.

Appeal—Record—Question Presented for Review.—In order to sustain an objection to an alleged urging of damages for the first time in plaintiff's closing address, it must appear by the record that the question had not in fact been before discussed.

Same—Review—Discretion of Court.—A case will not be reversed, in the absence of a showing of an abuse of discretion, for the action of the trial court in permitting plaintiff's counsel to urge the question of damages for the first time in the closing address.

Appeal from Appellate Court, First District.

Action by Mollie Bovard, administratrix of George Bovard, deceased, against the Pittsburg, Cincinnati, Chicago & St. Louis Railway Company. From a judgment of the appellate Court (121 Ill. App. 49), affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

This is an action in case, brought in the superior court of Cook county by appellee against the appellant company to recover damages for the death of the appellee's husband, George Bovard, deceased, alleged to have been caused by the negligence of the appellant. The trial below resulted in a verdict and judgment in favor of appellee, which judgment has been affirmed by the Appellate Court. The present appeal is prosecuted from such judgment of affirmance.

The accident, which resulted in the death of the deceased, occurred on December 14, 1899, in the railroad yard of the Pittsburg, Fort Wayne & Chicago Railroad Company, commonly referred to as the Fort Wayne road, between Fifty-Fourth and

*For the authorities in this series on the question whether employees of different masters may be fellow servants, see foot-notes appended to *Wagner v. Boston Elevated Ry. Co.* (Mass.), 19 R. R. R. 187, 42 Am. & Eng. R. Cas., N. S., 187; *Norman v. Middlesex & S. Traction Co.* (N. J.), 19 R. R. R. 16, 42 Am. & Eng. R. Cas., N. S., 16; *Lookout Mountain Iron Co. v. Lea* (Ala.), 19 R. R. R. 10, 42 Am. & Eng. R. Cas., N. S., 10.

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Fifty-Fifth streets in the city of Chicago. The original declaration, filed August 24, 1900, consisted of one count, and averred that the appellant was possessed of a locomotive engine then and there under the care of its servants, who were operating and driving the same upon and along a certain track, owned, leased, or controlled by appellant, at a point near the intersection of said streets; that appellant so negligently managed said engine, as to kick a caboose car down an inclined track controlled by appellant and ran it against the deceased, George Bovard, "while with all due care and diligence he was walking along said tracks with the knowledge and consent of defendant," and thereby threw him against another locomotive, and killed him. An additional count, filed February 27, 1904, alleged that the defendant was possessed of a certain engine and caboose, with which it was doing certain switching in the yard of a certain other railroad company in Chicago, and so carelessly managed said engine and caboose in doing said switching, that the caboose was run, or kicked with great force and violence, down a certain inclined track in said yard into and against a certain other engine; that the deceased was then employed by said other railroad company to work in said yards, and, while in the discharge of his duties as such employee, and exercising ordinary care for his own safety, he was then and there caught, crushed, and injured by and between said caboose and engine, and that, as a result of his said injuries, he died. On December 14, 1899, the deceased was a switch tender in said yard, and was hired and paid directly by the Fort Wayne company. A roundhouse for the housing of locomotive engines was located adjacent to the yard and in connection with certain tracks running in a northerly direction from Fifty-Fifth street, and known respectively as the "coal track," "scale track," "caboose track," and "track 17," which latter was also known as the "lead track." The appellant, by some arrangement with the Fort Wayne company, used the yard or premises in question to a certain extent with its freight engines and cabooses. The engines went into the roundhouse, and the cabooses upon the caboose track. The appellant's engineers and firemen went with their engines, and its freight conductors and brakemen went with their cabooses. The engineers and brakemen, in handling the engines and cabooses of appellant, were hired and paid by appellant, though it is claimed by appellant that the work of the switchmen, switch tenders, and brakemen was under the control of a yardmaster hired and paid by the Fort Wayne company. The claim of the appellee is that the death of the deceased, who was a switch tender in the employ of the Fort Wayne company, was caused by the negligence of certain freight train brakemen in the service of appellant, commonly called the Pan Handle road, in starting a caboose unattended down an inclined track, whereby it was permitted to run down hill until it dashed into the side of a locomotive about which the deceased was employed, and

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the deceased was caught between the caboose and locomotive and so seriously crushed that he died shortly afterward.

A. N. Waterman (*George Willard*, of counsel), for appellant.
James C. McShane, for appellee.

FARMER, J. (after stating the facts). The appellant, upon the trial below, asked the court to give to the jury a written instruction to the effect that, "the pleadings and all the evidence considered, the plaintiff is not entitled to recover; the jury will therefore return a verdict finding the defendant not guilty." The court refused to give this instruction, and such refusal is assigned as error. The instruction was properly refused, as there was evidence tending to show that appellant was guilty of negligence which caused the death of Bovard, and that, at the time of the accident, he, Bovard, was in the exercise of due care for his own safety, and that his death was not caused by the negligence of fellow servants.

At the time of the death of the deceased on December 14, 1899, certain employees of the Fort Wayne road were running an engine slowly northward along the coal track, and, at the time of the collision, this engine was near the junction of the coal track and track 17. It was the duty of the deceased to throw the switches for his engine thus running along the coal track. He occupied a shanty west of the coal track, and, for the purpose of throwing the switches located on the east side of the coal track, he came out of his shanty and crossed over north of the engine to a point east of the coal track. While the engine upon the coal track was passing him, the caboose in question, which had been kicked down track 17, ran into the side of the engine upon the coal track, and Bovard, being caught between the caboose and engine, was killed. Appellant's crew were switching the caboose out of the caboose track through the switch at the south end of the caboose track near Fifty-Fifth street. They kicked the caboose in question down track 17, which was an inclined track running from the elevation at Fifty-Fifth street down to the coal track. No person was upon the caboose which was thus kicked down track 17, so that its movement could not be regulated or stopped by the use of a brake or otherwise. As the track was a steep downgrade, there was nothing to stop the caboose until it struck the engine upon the coal track. The evidence shows that it was customary to have a brakeman, or conductor, or other employee, upon the caboose to control its movement, and, at this time, the conductor had gone to a telegraph office, and one of the brakemen ran after the caboose to try to catch it and stop it, but failed to do so. The evidence tends to show that the brakemen, who were switching out the caboose, were responsible for its running away.

There is evidence tending to show that the deceased was not guilty of any contributory negligence, inasmuch as he was

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merely doing his duty as a switchman in the employ of the Fort Wayne road in throwing the switches for the engine under the control of the Fort Wayne company, which passed along the coal track. The evidence also shows that he had no notice or knowledge of the approach of the unattended caboose upon track 17, which united with the coal track at the point where the accident occurred. The fireman on the engine which was struck by the caboose, and another person thereon with the fireman, both testified that they did not see the caboose until it struck the engine, and there is testimony going to show that, when the deceased saw the approaching caboose, he attempted to get out of the space between the engine and the caboose, but failed to do so before the collision occurred. To permit the caboose to run down the inclined track while no person was on it for the purpose of controlling its movements, tended to prove negligence of appellant's brakeman or conductor, or both.

As we read the argument of counsel for the appellant, it is not seriously contended by them that the servants of the appellant, who permitted the caboose to run unattended down the inclined track, were not guilty of negligence. But the proposition advanced by them and chiefly relied on for a reversal of this judgment is that the deceased switchman, who was throwing the switch on the coal track for the passage northward of the Fort Wayne engine, and the brakemen of the appellant, who were switching the caboose out of the caboose track and permitted it to run down the inclined track, were fellow servants, and, therefore, that appellant is not responsible for the negligence of the brakeman which caused the death of the deceased switchman, Bovard. Appellee takes the position that the question of whether the deceased was a fellow servant with those in charge of appellant's engine and caboose is foreclosed by reason of the fact that appellant submitted to the jury on the trial a special interrogatory requesting the jury to find whether the deceased and those in charge of appellant's engine and caboose were fellow servants, and that the jury found they were not. In this contention appellee is in error. The question submitted to the jury was simply a question of fact. Whether servants are fellow servants is a mixed question of law and fact. *Hartley v. Chicago & Alton Railroad Co.*, 197 Ill. 440, 64 N. E. 382. The jury may, upon a given state of facts, conclude that the relation of fellow servants did not exist, and yet the court may, upon the same facts, hold that, as a matter of law arising out of these facts, the relation of fellow servants did exist. By presenting to the court the peremptory instruction to direct a verdict for appellant, and the court having refused such instruction, the question was saved as one of law. The most usual requirement to constitute the relation of fellow servants is that the servants are in the employ of a common master. *Chicago & Alton Railroad Co. v. Raidy*, 203 Ill. 310, 67 N. E. 783; *Chicago & Alton Railroad Co. v. Harrington*,

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192 Ill. 9, 61 N. E. 622. To this there seems to have grown the exception arising from the lending, between employers, of the servants of one to the other. In the latter case, where the servant is temporarily loaned by the master to another for some special service, and the servant for the time becomes wholly subject to the direction and control of the person to whom loaned and for whom the special service is being performed and is wholly freed during such time from the direction of his master, he becomes the servant, for the time, of the person to whom loaned or hired, and during such time may bear the relation of fellow servant to the other servants of the master to whom he is thus loaned. *Grace & Hyde Co. v. Probst*, 208 Ill. 147, 70 N. E. 12.

The particular contention made by appellant grows out of the fact that at the time the injury was received the engine and caboose operated by appellant's servants were in the switch-yards of the Fort Wayne company. The latter company has what is known as a yardmaster, who directs what tracks shall be occupied or used by engines, trains, or cars coming into said yards. Out of these facts appellant advances the theory that during the time the engine and caboose were in the yards of the Fort Wayne company those in charge of it were subject to the control of the yardmaster of that company, and that the deceased was also subject to the control of the yardmaster of that company, and therefore they were fellow servants. We have examined the evidence sufficiently to be satisfied that this position is unsound. Appellant claims that the yardmaster and the servants of appellant and the deceased were engaged in a common enterprise, for a common purpose. We do not think this statement is sustained by the evidence. There was no purpose held in common between the yardmaster and the servants of appellant in charge of this engine and caboose, or between the deceased and said servants of the appellant. The appellant was simply passing through the yards in the control of the Fort Wayne company, and the company, in order to avoid confusion and protect its own business, directed what tracks should be occupied by trains of other companies coming into that yard, but gave no further or other directions than those. The negligence charged in this case was allowing the caboose to go down the switch by force of gravitation and without any one in charge of it, in such a manner that the deceased had no warning of its approach until escape was impossible. That is the theory of the declaration and the theory of the proof, with sufficient evidence to support it and fully warrant the court in submitting the question to the jury. Appellant's servants were not pursuing the business of the Fort Wayne company, but the business of appellant. They were not loaned to the Fort Wayne company, nor under its command or control further than was necessary to obey the commands of its yardmaster in the use of its tracks. The yardmaster gave no

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commands or directions as to how the switching should be done, and was in no manner responsible for the caboose being thrown down the inclined switch with no one in control of it; nor did the deceased in any manner co-operate in the acts of the servants of appellant, nor, so far as the record discloses, have any knowledge of their presence in the yards until at the moment of his injury.

The appellant complains that the second instruction given by the trial court in behalf of the appellee upon the trial below is erroneous. That instruction is as follows: "The court instructs the jury that to constitute defendant's servants, who were switching the caboose in question, fellow servants of George Bovard, deceased, so as to exempt the defendant from liability on account of the death of deceased from the negligent acts of defendant's said servants (provided you believe from the evidence deceased's death was caused by the negligent acts of said servants) said servants and deceased should be actually co-operating, just before, and at the time of, the collision which caused deceased's death, in the particular business in hand, or their usual duties should bring them into habitual consociation with each other, so that they might exercise an influence upon each other promotive of proper caution for their personal safety." The instruction is in accordance with the language used by this court in *Chicago & Alton Railroad Co. v. O'Brien*, 155 Ill. 630, 40 N. E. 1023, and *North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57, 29 N. E. 186. The instruction is charged with being erroneous upon two grounds: First, because it is said to assume that the death of the deceased resulted from the negligence of appellant's servants; and second, that it omits to condition the right of recovery upon the exercise of due care on the part of the deceased. Neither of these objections is well taken. As to the first, the jury are required to believe from the evidence that the deceased's death was caused by the negligent acts of appellant's servants, and, therefore, such negligence is not assumed to have existed. As to the second objection, the instruction only purported to state the law in reference to the question of fellow servants, and, therefore, it was unnecessary to embody in the instruction a statement in regard to the care of the deceased for his own safety. In *Chicago & Eastern Illinois Railroad Co. v. Hines*, 132 Ill. 161, 23 N. E. 1021, 22 Am. St. Rep. 515, it was said: "It is not required that the entire law of the case shall be stated in a single instruction, and it is therefore not improper to state the law as applicable to particular questions, or particular parts of the case, in separate instructions." The criticism cannot be made upon this instruction that it states, if certain facts are found, the jury may render a verdict for the plaintiff, and omits certain other facts necessary to be found in order to entitle the jury to find for the plaintiff. The instruction, on the contrary, merely states a rule in regard to fellow servants which would exempt appellant from liability.

It is also said the court below erred in refusing to give the first instruction asked by the appellant. This instruction was properly refused, because it required the jury to find that, if certain facts were found, the relation of fellow servants existed between the deceased and the yardmaster, as a matter of law. Here, under the evidence, the question as to whether the relation of fellow servants existed was a question of fact, and submitted to the jury for their decision by the instructions asked by and given for both sides.

It is furthermore assigned as error that improper remarks were made by counsel for appellee in his closing argument to the jury. In his closing argument to the jury, counsel for appellee argued the question as to the amount of damages to which appellee was entitled, and stated that the appellee, as the widow of the deceased, and her children, were entitled to the sum of \$5,000, being the maximum fixed by the statute in such case, as damages for the death of the husband and father. The reason why these remarks of counsel in his closing address are alleged to be improper, is the claim that the question of damages was not discussed by counsel in his opening argument. This objection is without force, because it does not appear from the record that the question of damages was not discussed by both counsel before appellee began his closing address to the jury. As is well said by the Appellate Court in its opinion deciding this case: "It is sufficient to say, in relation to the objection made—that the court should have prevented counsel for appellee from arguing the question of damages in his last address to the jury, or have allowed appellant's counsel to reply—that there is nothing in this record showing the basis of such complaint, namely, that the subject of damages had not before in the argument been discussed." But, if it be assumed that no prior reference had been made to the question of damages, it was not reversible error to permit counsel for appellee to refer to that subject in his closing address. "A concluding argument ought properly to be confined to the grounds stated and points of law announced in the opening argument, and a reply to what has been brought out in the argument of opposing counsel; but where the court permits counsel to comment upon matters in evidence not discussed by his opponent, and the latter is afforded no opportunity for reply, the Appellate Court will not reverse the judgment unless a clear abuse of discretion is shown." 2 Ency. of P. & Pr. pp. 708, 709. In *Hull & Co. v. Alexander*, 26 Iowa, 573, it is said: "The objection that the court permitted counsel for the defendants in their closing arguments to refer to and comment upon other portions of these defendants' answer in the foreclosure case than such as were referred to by plaintiff's counsel, and no opportunity afforded for a reply to such new portions, pertains to a question of discretion in the district court, and no abuse of such discretion is shown." So, in the case at bar, it may be said that questions of this kind are matters resting

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in the sound discretion of the trial court. It does not appear in the case at bar that there was any abuse of that discretion by the trial court which was prejudicial to the appellant.

We see no good reason for reversing the judgment in this case. Accordingly, the judgment of the Appellate Court, affirming the judgment of the superior court, is affirmed.

Judgment affirmed.

PITTSBURGH, C., C. & ST. L. RY. CO. v. LIGHTHEISER.

(Supreme Court of Indiana, Oct. 31, 1906.)

[78 N. E. Rep. 1033.]

Constitutional Law—Ex Post Facto Law.—The constitutional provision prohibiting the passage of ex post facto laws is only applicable to criminal and penal laws, and does not apply to an employers' liability act.

Appeal—Former Decision—Law of the Case.—Where, on a prior appeal of an action for injuries to a servant, it was held that the employers' liability act of 1893 was not unconstitutional, either as impairing the obligation of contracts between employer and employee, or as an ex post facto law, such decision constituted the law of the case on retrial.

Trial—General Verdict—Interrogatories.—Unless answers to special interrogatories are in irreconcilable conflict with the general verdict when aided by all reasonable presumptions, the general verdict will be sustained.

Same.—Where, in an action for injuries to an engineer, the jury found, in answer to certain interrogatories, that plaintiff, while going across defendant's north-bound track and while standing between the tracks, listened for a train, and that there was something to prevent him from seeing and hearing the approaching engine and car that struck him in time to avoid the injury, answers to other interrogatories that there was no evidence to show that plaintiff could not see and hear the train that struck him in time to have avoided the injury did not establish that plaintiff was guilty of such contributory negligence as would vitiate a general verdict in his favor.

Same—Inconsistent Answers.—Where answers to special interrogatories submitted to a jury are inconsistent, or so uncertain that their meaning cannot be ascertained, they antagonize each other, and cannot affect the general verdict.

Master and Servant—Injuries to Servant—Railroads—Employers' Liability Act—Vice Principal.*—Burns' Ann. St. 1901, § 7083, provides that every railroad or other corporation operating in the state shall be liable for personal injuries suffered by any employee while in the service, exercising due care, if the injury was caused by the negligence of any person in the service of such corporation having charge of any signal, telegraph office, switchyard, shop, roundhouse, locomotive engine, or train upon a railway, etc. Held, that such act enlarged the class of vice principals previously existing, and under it railroad corporations were liable for injuries to a servant caused by the negligence of an employee in charge of any signal, etc.

*For the authorities in this series on the subject of the applicability of employers' liability acts, see foot-notes appended to *Hemp-hill v. Buck Creek Lumber Co.* (N. Car.), 20 R. R. R. 411, 43 Am. & Eng. R. Cas., N. S., 411.

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Same—Assumed Risk.†—The defense of assumed risk is not available in an action against a railway company for injuries to an employee caused by a fellow servant in charge of a locomotive engine on a railway, under the employers' liability act (Burns' Ann. St. 1901, § 7083, subd. 4), making railroad companies liable for injuries to servants caused by the negligence of any person in the service of the corporation in charge of any signal, locomotive engine, train, etc.

Corporations—Corporate Existence—Admission.—A corporation by a general appearance to an action brought against it, admits its corporate existence.

Master and Servant—Injuries to Servant—Employment.*—Where plaintiff at the time of his injury was in the employ of defendant railroad company as a passenger engineman, and was standing between defendant's east and west bound main tracks, where he had gone to take charge of his own engine when it backed down to be connected with defendant's passenger train, he was engaged in defendant's service when injured, within the employers' liability act (Burns' Ann. St. 1901, § 7083), imposing a liability on railroad corporations for injuries sustained by servants through the negligence of certain fellow servants engaged in the operation of the railroad.

Same—City Ordinances—Violation—Negligence Per Se.†—Failure of the operatives of a railroad train to observe certain city ordinances regulating the operation of railroads within the limits of the city constitutes negligence per se sufficient to sustain a recovery for injuries to another servant proximately caused thereby, in the absence of proof of contributory negligence.

Same—Rules—Violation.‡—In an action for injuries to a servant of a railroad company, plaintiff's violation of a rule of the company at the time he was injured would not prevent a recovery, unless the violation of such rule proximately contributed to his injury.

Same—Contributory Negligence—Question for Jury.—In an action for injuries to an engineer by being struck by a mail car while standing between two tracks at night, evidence held to require submission of the question of his contributory negligence in occupying such place to the jury.

Same—"Look and Listen" Rule.—The "look and listen" rule, applicable to travelers at railroad crossings, does not apply in all strictness to railroad employees required to remain on or about the track.

Constitutional Law—Contract Obligation—Impairment—Employers' Liability Act.**—Where, in an action for injuries to an engineer, there was no evidence of an express contract of employment,

†For the authorities in this series on the subject of the effect of the contributory negligence of, or assumption of risk by, the injured servant on the right to recover under an employers' liability act for his injuries or death, see foot-notes appended to *Atlantic Coast Line R. Co. v. Ryland* (Fla.), 18 R. R. R. 834, 41 Am. & Eng. R. Cas., N. S., 834.

‡See foot-notes appended to *Norfolk & W. Ry. Co. v. Gesswine* (C. C. A.), 20 R. R. R. 553, 43 Am. & Eng. R. Cas., N. S., 553.

§For the authorities in this series on the subject of contributory negligence and assumption of risk where employees fail to comply with the master's rules and regulations, see foot-notes appended to *Baltimore & O. R. Co. v. Doty* (C. C. A.), 17 R. R. R. 753, 40 Am. & Eng. R. Cas., N. S., 753; *Illinois Cent. R. Co. v. Stith's Adm'x* (Ky.), 16 R. R. R. 729, 39 Am. & Eng. R. Cas., N. S., 729; foot-notes appended to *Moore v. St. Louis, etc., Ry. Co.* (La.), 16 R. R. R. 370, 39 Am. & Eng. R. Cas., N. S., 370; *Demko v. Carbon Hill Coal Co.* (C. C. A.), 16 R. R. R. 232, 39 Am. & Eng. R. Cas., N. S., 232.

**For the authorities in this series on the subject of the constitutionality of employers' liability acts, see foot-notes appended to

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except that plaintiff entered defendant's service in 1874 as a passenger engineman, and continued in such service until his injury in January, 1901, the employers' liability act of 1893, making railroad companies liable for injuries to servants caused by the negligence of certain fellow servants, was not unconstitutional in so far as it applied to plaintiff's cause of action, as violating constitutional provisions prohibiting the impairment of the obligation of contracts.

Evidence—Demonstrative Evidence—Injured Member—Exhibition to Jury.††—In an action for injuries to a servant, it was not error for the court to permit plaintiff to exhibit his injured foot to the jury, and to testify that it was stiff at the ankle joint, and by movements show the effects of the injury on his ability to use it.

Same—Carlisle Mortality Tables.††—In an action for permanent injuries to a railroad employee, it was not error for the court to admit the Carlisle Tables of Mortality in evidence.

Trial—Instructions—Form.—An instruction, in an action for injuries, that plaintiff was entitled to recover, if the jury found from a preponderance of the evidence that the material allegations of the complaint were proven, without specifying what the material allegations were, was not erroneous as submitting to the jury questions of both law and fact.

Same—Definition of Issues—Instructions—Duty to Request.—Mere failure of the court to state the issue in its instructions is not error; it being the duty of a party, desiring specific instructions defining the issues, to prepare and submit a proper request therefor.

Master and Servant—Injuries to Servant—Care Required of Servant.§§—Where a railroad engineer was struck and injured while standing between two main tracks at night, an instruction that he was required to exercise such care as persons of ordinary care and prudence would exercise under like circumstances properly stated plaintiff's duty in the premises.

Negligence—Several Acts—Proof.—Where several acts of negligence were sufficiently alleged in the complaint, plaintiff was entitled to recover if he established that the injury complained of was the result of any one or more of such acts.

Appeal—Assignments of Error—Instructions.—An objection in appellant's statement of points that the instructions given by the court, of its own motion and at the request of appellee, were indefinite, uncertain, and inapplicable to the evidence, without stating how or in what respect any one of the instructions was indefinite, etc., was insufficient.

Trial—Interrogatories—Reading to Jury—Discussion of Evidence.—Where special interrogatories are to be submitted to the jury, it is proper for counsel to read and comment on them to the jury, and to array the evidence necessary to be considered in answering them.

Same—Misconduct of Counsel—Remedies.—Where counsel for

Kane v. Erie R. Co. (C. C. A.), 20 R. R. R. 233, 43 Am. & Eng. R. Cas., N. S., 233.

††For the authorities in this series on the subject of the admissibility of experimental evidence in negligence cases, see foot-notes appended to Chicago & E. I. R. Co. v. Crose (Ill.), 20 R. R. R. 512, 43 Am. & Eng. R. Cas., N. S., 512; Warren v. City Electric Ry. Co. (Mich.), 19 R. R. R. 164, 42 Am. & Eng. R. Cas., N. S., 164; O'Dea v. Michigan Cent. R. Co. (Mich.), 19 R. R. R. 53, 42 Am. & Eng. R. Cas., N. S., 53.

††See foot-notes appended to Southern Pac. Co. v. Cavin (C. C. A.), 20 R. R. R. 803, 43 Am. & Eng. R. Cas., N. S., 803.

§§For the authorities in this series on the question of the degree of care required of a servant for his own protection, see foot-notes appended to Cole v. St. Louis Transit Co. (Mo.), 17 R. R. R. 583, 40 Am. & Eng. R. Cas., N. S., 583.

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plaintiff erroneously told the jury how to answer certain of the interrogatories which were to be submitted, defendant was only entitled to have the jury sufficiently admonished without delay that such statement should not be considered, and was not entitled to have the jury discharged.

Same—Curing Error.—Misconduct of counsel in advising the jury how to answer certain of the interrogatories to be submitted to them was cured by an instruction that the interrogatories should be answered according to the preponderance of the evidence.

New Trial—Damages—Excessiveness—Prejudice.—A verdict will not be disturbed because of excessive damages, unless the damages are so excessive as to indicate that the jury acted from prejudice, partiality, or corruption.

Constitutional Law—Federal Constitution—Due Process of Law—Application.—Const. U. S. Amend. 5, providing that no person shall be deprived of life, liberty, or property without due process of law, operates merely as a restriction on federal power, and has no application to the states.

Same—Privileges and Immunities of Citizens—Corporations.—Corporations are not citizens of the United States, within Const. U. S. Amend. 14, providing that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.

Same—Employers' Liability Act.**—Employers' Liability Act 1893 (Burns' Ann. St. 1901, § 7083 et seq.), providing that every railroad or other corporation operating within the state shall be liable for injuries to employees caused by the negligence of certain other employees in charge of any signal, telegraph office, switchyard, shop, roundhouse, locomotive engine, or train on a railroad, etc., was not unconstitutional as a deprivation of property without due process of law.

Same—Equal Protection of Laws.††—Such act should not be construed as limited to corporations operating railroads, but to apply as well to every corporation, company, co-partnership, or person engaged in railroad operation, and their employees, and, as so construed, was not unconstitutional as depriving railroad corporations of the equal protection of the laws.

Appeal—Statement of Points—Error Not Raised.—An alleged error or point, not contained in appellant's statement of points, cannot be afterwards raised, either by reply brief, in the oral or printed argument, or on petition for rehearing, but will be considered waived as provided by Supreme Court Rule 22, cl. 5 (55 N. E. vi).

Appeal from Circuit Court, Cass County; T. F. Palmer, Special Judge.

Action by George W. Lightheiser against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

G. E. Ross, for appellant.

Frederick Landis, Nelson, Myers & Yorlott, and McConnell, Jenkins, Jenkins & Stuart, for appellee.

MONKS, J. Appellee brought this action to recover damages for personal injuries sustained by him while in the service of appellant by reason of being knocked down and run over by appellant's train at its station in the city of Logansport, Ind. This is the second appeal of said cause. Pittsburgh, etc., Ry.

** ††See foot-notes on preceding pages.

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Co. v. Lightheiser, 163 Ind. 247, 71 N. E. 218, 660. On the former appeal the second paragraph of complaint was held sufficient upon demurrer. The other paragraphs of the complaint being the first, third, and fourth, were held insufficient, and the cause reversed for that reason. When the cause was returned to the court below, appellee filed an amendment first paragraph of complaint. Appellant's demurrer thereto for want of facts was overruled. After issues were joined the cause was tried by a jury, and a general verdict returned in favor of appellee. The jury also found specially upon particular questions of fact stated to them in writing in the form of interrogatories, submitted by the court under section 555, Burns' Ann. St. 1901 (Acts 1897, p. 128, c. 85). Over a motion by appellant for judgment in its favor on the answers to the interrogatories, submitted by the court under section 555, Burns' motion for a new trial, the court rendered judgment on the general verdict in favor of appellee. The errors assigned call in question the action of the court in overruling (1) the demurrer to the amended first paragraph of complaint; (2) the motion for a judgment in favor of appellant on the answers of the jury to the interrogatories notwithstanding the general verdict; and (3) the motion for a new trial.

This court on the former appeal held (163 Ind. 256-262. 71 N. E. 218, 660) that the second paragraph of complaint was founded upon the employers' liability act (section 7083 et seq. Burns' Ann. St. 1901), and that it was sufficient to withstand a demurrer for want of facts. It appears from said second paragraph that appellee was in the employ of appellant as locomotive engineer, and that he received the injuries sued for in the city of Logansport, Ind., during the nighttime, by being knocked down and run over by a train, consisting of a locomotive and mail car belonging to appellant, which was being run backwards in appellant's yards. It is averred in said paragraph that appellee had been ordered to make a trip upon appellant's road; "that in obedience to said order plaintiff, as was his duty under his employment, took his position between the track on which his locomotive was standing and the track on which said locomotive and mail car were (the mail car being in front) for the purpose of examining, accepting, taking charge, and assuming control, as locomotive engineer, of his said locomotive; that the said locomotive began to move east, and at the same time said locomotive and mail car passed him, leaving a space of but four feet between said mail car, which was in front, and his locomotive, where he might stand." It is further alleged that while appellee was occupying this position, "as it was his duty to do under his employment," he was knocked down and run over by said mail car and locomotive engine. Said paragraph counts on the negligence of the engineer in control of the locomotive which was moving the mail car. He is charged with negligently moving said mail car backwards

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without a person stationed on the forward end thereof, so as to perceive the first sign of danger and to signal the engineer, as required by a rule of appellant. Said engineer is also charged with negligence in moving said locomotive and mail car in violation of certain ordinances of the city of Logansport. It is also alleged that appellee was knocked down and run over by said car as a result of the negligence pleaded. Said amended first paragraph of complaint is founded on the fourth subdivision of the employers' liability act and is the same as the second paragraph held good on the former appeal, except it pleads the violation of four additional rules of the company not mentioned in the second paragraph. On the former appeal one of the many objections made by appellant's counsel to said second paragraph of complaint was "that, as it appeared therefrom that appellee had been continuously in the employment of appellant as a locomotive engineer for 27 years, the employers' liability act of 1893 is unconstitutional in such as amounting to an attempt to impair the obligation of a contract in violation of section 24 of article 1 of the state Constitution and section 10 of article 1 of the Constitution of the United States, which prohibits the passing of any 'ex post facto' law or law impairing the obligation of contract." On this appeal he contends that for the same reason said employers' liability act violates the ex post facto clause of the said sections. It is settled that the phrase "ex post facto laws" is only applicable to criminal and penal laws, and not to laws like the one in controversy in this case. Cooley's Constitutional Limitations (7th Ed.) 373-376. But, if it were otherwise, what was said by this court on the former appeal as to the contention then made is a sufficient answer to the one now made. This court said (163 Ind. 262, 71 N. E. 218, 600): "It is enough to dispose of this objection to state that it does not appear that there was any such definite agreement between the parties for the future as would warrant the assertion that any contract right had been impaired." Upon the authority of the opinion on the former appeal, we hold that said amended first paragraph is sufficient, and that the court did not err in overruling the appellant's demurrer thereto.

Appellant next insists that the court below erred in overruling the motion for judgment in its favor on the answers of the jury to the interrogatories notwithstanding the general verdict. The general verdict necessarily determined all material issues in favor of appellee, and it is well settled that, unless the answers of the jury to the interrogatories are in irreconcilable conflict with the general verdict, the court did not err in overruling appellant's motion for judgment in its favor. The answers to the interrogatories cannot be aided by any presumptions, for the rule is that all reasonable presumptions will be indulged in favor of the general verdict, and none will be indulged in favor of the answers to the interrogatories. The special findings of the jury in answer to the interrogatories

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override the general verdict only when both cannot stand; the conflict being such upon the face of the record as to be beyond the possibility of being removed by any evidence admissible under the issues in the cause. *Johnson v. Gibhauer*, 159 Ind. 271, 282, 283, 64 N. E. 855, and cases cited; *Indiana, etc., Ry. Co. v. Maurer*, 160 Ind. 25, 27, 66 N. E. 156; *Southern, etc., Ry. Co. v. Peyton*, 157 Ind. 690, 697, 61 N. E. 722; *City of Jeffersonville v. Gray*, 165 Ind. 26, 29, 74 N. E. 611, and cases cited; *McCoy v. Kokomo Ry. & Light Co.*, 158 Ind. 662-664, 64 N. E. 92, and cases cited. Appellant claims that the jury's answers to interrogatories show that "appellee entered appellant's employ in 1874 as locomotive engineman; that he served as such for 10 years; that 17 years prior to January 19, 1901, the date when he received the injuries sued for, he was promoted to passenger engineman, and that he served appellant as such continuously up to the time of his injuries; that he took charge of his engine on the morning he was injured at appellant's shops about one mile east of its passenger station, and ran such engine down to the passenger station, where he alighted to get his orders; that he knew of the location and use of appellant's tracks; that the rules of the company required him, after receiving his orders, to go and take charge of his engine; that he received his orders at 3:23 a. m., but that he did not go to his engine, although he had ample time and opportunity; that it was customary for appellant to use the east-bound main track while a train was standing at the passenger platform on the north-bound track; that the space between the two tracks was sufficient for plaintiff to stand and not be injured by passing trains; that the jury found, in answer to interrogatories 131 and 133, that there is no evidence to show that the appellee could not see and hear the approaching train that struck him in time to have avoided the injury." Counsel for appellant insists that, "when the jury found the facts above stated, they found that appellee saw and heard the approaching train, because the law assumes he saw and heard it, if the view is unobstructed and there is no evidence that he did not see and hear it. If the facts above set out are true, appellee not only assumed the risk which caused his injury but he is guilty of contributory negligence. Said facts cannot be true and the general verdict stand."

It is not necessary to determine what effect, if any, the facts stated by appellant's counsel as found by the jury would have upon the general verdict, for the reason that the jury also find other and additional facts in answers to interrogatories which show that appellee, while going across the north-bound main track, or while standing between the two tracks, listened to see if he could hear whether a train of cars was approaching; that he could not have seen the engine and car approaching, if he had looked carefully and diligently; that there was something to prevent appellee seeing and hearing the approaching

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engine and car which struck him, in time to avoid the injury. In view of these additional facts, it cannot be said that the jury found that appellant's view was not obstructed, nor that appellee saw and heard the approaching train as claimed by counsel for appellant. If said answers of the jury to interrogatories are inconsistent or contradictory, they antagonize and destroy each other and cannot control the general verdict. *Wabash Ry. Co. v. Savage*, 110 Ind. 156, 161, 9 N. E. 85; *Baltimore, etc., Ry. Co. v. Rowan*, 104 Ind. 88, 96, 97, 3 N. E. 627; *McCoy v. Kokomo Ry. Co.*, 158 Ind. 662, 665, 64 N. E. 92, and cases cited. If they are so uncertain that their meaning cannot be ascertained, they cannot be used to control the general verdict. *Grand Rapids, etc., R. Co. v. McAnnally*, 98 Ind. 412, 417, and cases cited. It is clear, under the rules above stated, as established by the decisions of this court, that the facts found by the jury as above set out are not in irreconcilable conflict with the general verdict, which found that appellee was not guilty of contributory negligence.

The part of section 7083, Burns' Ann. St. 1901, being section 1 of the act known as the "Employer's Liability Act" (Acts 1893, p. 294, c. 130), under which this action was brought, is as follows: "That every railroad or other corporation except municipal operating in this state shall be liable for damages for personal injury suffered by any employee while in its service, the employee so injured being in exercise of due care and diligence, in the following cases: * * * Fourth. Where such injury was caused by the negligence of any person in the service of such corporation who has charge of any signal, telegraph office, switch-yard, shop, roundhouse, locomotive engine or train, upon a railway," etc. It is evident that the language above quoted from said fourth subdivision of said section describes a class of servants for whose negligence railroads are made liable. In other words, it enlarged the class of vice principals as it had existed before said act took effect, and under the provisions thereof railroad corporations are liable for the negligence of such employees; that is, any person in the service of such company who has charge of any signal, telegraph office, switchyard, roundhouse, locomotive engine, or train upon a railway the same as for the negligence of vice principals. *Baltimore Ry. Co. v. Little*, 149 Ind. 167, 170-172, 48 N. E. 862; *Ind. Union Ry. Co. v. Houlihan*, 157 Ind. 494, 499, 60 N. E. 943, 54 L. R. A. 787, and cases cited; *Thacker v. Chicago, etc., Ry. Co.*, 159 Ind. 82, 84-86, 64 N. E. 605, 59 L. R. A. 792. It is clear that the doctrine of assumed risk is not applicable to an action brought, like this, under the part of said fourth subdivision above quoted. To hold otherwise would establish in its full vigor the fellow servant rule, which the statute was intended to abrogate as to the employees mentioned. *American Rolling Mills Co. v. Hullinger*, 161 Ind. 673, 679, 680, 67 N. E. 986, 69 N. E. 460; *Davis v. N. Y., N. H. &*

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H. Ry. Co., 159 Mass. 532, 536; 34 N. E. 1070; *Murphy v. City Coal Co.*, 172 Mass. 324, 52 N. E. 503; *Woodward Iron Co. v. Andrews*, 114 Ala. 243, 21 South. 440; *Southern Ry. Co. v. Johnson*, 114 Ga. 329, 40 S. E. 235; *St. Louis Ry. Co. v. Touhey*, 67 Ark. 209, 54 S. W. 577; 77 Am. St. Rep. 109; 2 Labatt's Master & Servant, § 650, and note; Reno's Employers' Liability Acts (2d Ed.) §§ 249, 250. It is evident that the court did not err in overruling appellant's motion for a judgment in its favor on the answers to the interrogatories.

Appellant contends that "the evidence is wholly insufficient to sustain the verdict for the following reasons, and each of them, viz.: (a) That the defendant was, at the time complained of, 'a railroad or other corporation.' (b) That the plaintiff was, at the time he was injured, at a place where he had a right to be and in the performance of his duties. (c) That plaintiff's injury was the result of any act or omission of any employee of the defendant in the performance of his duties, while in charge of a locomotive engine or train upon defendant's railway. (d) That plaintiff did not assume the risk which brought about his injury. (e) The evidence conclusively shows plaintiff to have been guilty of contributory negligence. (f) No duty is shown to have been violated which the defendant owed the plaintiff. (g) There is no evidence to show that if there had been a flagman with a light on the end of the car, or the train had been run slower, or the bell rung, that the plaintiff would have seen or heard the train and would not have been injured. (h) There is no evidence that the plaintiff was ordered to go between the tracks, or that such place was where his duties required him to be. (i) The evidence is undisputed that plaintiff was perfectly familiar with the defendant's tracks and their use, the distance between the tracks, that the engine taken from the incoming train was usually backed east along the east-bound track to the shops, while the train it brought in was still standing at the station on the north-bound track, and that it was dangerous to go between the tracks."

It is well settled that a corporation, by a general appearance to an action brought against it, admits its corporate existence, and estops itself from denying the same. *Adams Ex. Co. v. Hill*, 43 Ind. 157, 162; *Ohio Oil Co. v. Detamore*, 165 Ind. 243, 247, 73 N. E. 906; *Seaton v. C., R. I. & P. Ry. Co.*, 55 Mo. 416; *Chicago & Alton Ry. Co. v. Glenny*, 175 Ill. 238, 51 N. E. 896; *Perris Irr. Dist. v. Thompson*, 116 Fed. 832, 54 C. C. A. 336; *Gauthier Decorating Co. v. Ham*, 3 Colo. App. 559, 34 Pac. 484; *Mo. Riv., Ft. Scott & Gulf Ry. Co. v. Shirley*, 20 Kan. 664; *Baldwin Coal Co. v. Davis*, 15 Colo. App. 371, 62 Pac. 1041; *U. S. Express Co. v. Bedbury*, 34 Ill. 459, 467; 5 Ency. of Pl. & Pr. 90; 6 Thompson on Corporations, §§ 7645, 7646; 10 Cyc. 1347; 3 Cyc. of Evidence, p. 613, and cases cited. If a corporation, by a general appearance, as by filing an answer, admits that it is a corporation and is thereby estopped from

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denying that it is a corporation as alleged in the complaint, it is evident that it is not necessary for the plaintiff to introduce any evidence to prove such allegation. *Adams Express Co. v. Hill*, 43 Ind. 162. It follows, also, that the court's instruction to the jury that no proof of such allegation was necessary was correct. To maintain an action under the part of the fourth subdivision of section 7083, *supra*, appellee must have been actually engaged in the service of the appellant at the time of the injury.

The evidence shows that appellee was, at the time of his injury, in the employ of the appellant as a passenger engine-man, and was standing between the west-bound main track and the east-bound main track of appellant's road, where he had gone, as he testified, to take charge of his engine when it backed down to be connected with appellant's passenger train, which was over an hour late. It is clear from the evidence that he was actually engaged in appellant's service when injured. *Reno's Employers' Liability Acts* (2d Ed.) p. 27; *Dresser's Employers' Liability Acts*, § 13, and cases cited. The jury found in answer to the interrogatories that said engine and car that ran against appellee and injured him was not in charge of Jerry Miller, as claimed by appellant, and that said engine was in charge of said Graver as engineman. The evidence showed that Engineman Graver was in the service of appellant as such engineman when appellee was injured, and that he was running his engine backward, pushing the mail car that injured appellee. No person was on said engine, when so pushing said mail car backward, except said Graver and his fireman. Appellee testified that said Graver was in charge of said engine. The record does not sustain appellant's contention that there was no evidence that Engineer Graver was in charge of said train. Moreover, if said Engineman Graver had only been in charge of locomotive engine, this would bring the case within the terms of said fourth subdivision. *Labatt, Master & Servant*, vol. 2, pp. 2037, 2038, 2039; *Id.*, p. 2037, note 12; *Fairman v. Boston & Albany Ry. Co.*, 169 Mass. 170, 177, 47 N. E. 613; *McCord v. Commell* (1896) H. L. Appeal Cases, 57.

At the time of appellee's injury there was in force in the city of Logansport an ordinance which contained four provisions, as follows: (1) "It shall be unlawful for any person to run any locomotive or car at a greater speed than six miles per hour within the city limits." (2) "It shall be the duty of the engineer or other persons having charge of any locomotive within the limits of said city to ring the bell before starting such locomotive either forward or backward and to continue the ringing of the bell during the entire time such locomotive or train is in motion while passing through any portion of said city." (3) "Any locomotive engine, railroad car, or train of cars running in the nighttime on any railroad train in the said city shall have and keep while so running, a brilliant and conspicuous

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light on the forward end of such locomotive engine or train of cars." (4) "And shall have and keep some sufficient signal light in charge of some competent person, who shall remain upon the rear end of such locomotive engine, car or train of cars whenever the same shall be backing on any track as aforesaid." A penalty was provided in said ordinance for the violation of each of said provisions. The evidence of appellee shows that each of the provisions of said ordinance was violated as alleged in the complaint. The failure, on the part of the appellant and those in charge of said train at the time of appellee's injury, to observe or comply with any one or all of the requirements of said ordinance was negligence per se and appellant was liable to appellee for any injury of which such negligence was the proximate cause, provided he was not guilty of contributory negligence. *Baltimore & O. S. W. Ry. Co. v. Peterson Ad.*, 156 Ind. 364, 367-372, 59 N. E. 1044, and cases cited; *Pittsburgh, etc., Ry. Co. v. Lightheiser*, 163 Ind. 247, 256, 71 N. E. 218, 660.

It appears from the evidence that appellant's railroad at the passenger station in the city of Logansport consisted of two main tracks between Second and Fifth streets, one being the north or west bound main track for trains coming from the east and going west, while the second was the east or south bound main track for trains coming from the west and going east or south; that appellant's passenger station was located at and across the south end of Fourth street, but on the north side of the north or west bound track and about 16 feet therefrom; that south of these two main tracks was a side track, connected with the south or east bound main track at a point about opposite the east end of the passenger station and running west parallel with said main track beyond Second street; that west of Third street there was a cross-over connecting said two main tracks, the same being used to shift trains or parts of trains from one main track to the other. On the morning appellee was injured he ran his engine from the roundhouse to the restaurant just west of the passenger station on the west-bound main track, his engine being headed to the west. He left his engine in charge of the fireman and went into the restaurant to get a lunch. Before 3:05 a. m., when his train was due, he went upstairs in the passenger station to get his orders, which were issued by the train dispatcher. His orders not being ready, he returned to the restaurant. Later he and his conductor returned to the train dispatcher's office for their running orders and received the same. Thereupon they returned to the restaurant and remained there until the arrival of their train from Columbus, Ohio, at 4:38 a. m., about 1 hour and 30 minutes late; said train coming in on the west-bound main track. The engine, which had a headlight burning on its west or forward end, and the mail car, were cut off from said train and run west on said main track to the cross-over track, and

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then shifted to the east-bound main track and backed east and stopped on said east-bound main track, clearing the east line of Third street. While said engine and mail car were standing there, appellee's fireman backed his engine, which had a headlight burning on its west or forward end, to the eastward on the west-bound main track to be coupled to his train, and passed said engine and mail car, at which time and while appellee's engine was still going east said engine and mail car also backed east, the mail car in front, on the east-bound main track, and the northeast corner of said mail car struck appellee, who was standing between the west and east-bound main tracks, 50 or 60 feet west of the west end of his train and 90 or 100 feet west of the passenger station, knocked him down, and run over and crushed his right leg and his ankle and foot on his left leg, so that his right leg was afterwards amputated 7 inches below the knee. Appellee testified that it was about 4:20 or 4:25 a. m. when he and his conductor received their running orders; that the weather was very cold, it being 3 or 4 degrees above or below zero; that upon the train being announced he came out of the restaurant and went in a southwest direction around the west end of his train, standing on the west-bound main track, and went between the two main tracks to the place where he was injured; that appellant's tracks are level, with planking between the rails and between the tracks; that when he passed his train the engine and mail car had been cut off and run west on said west-bound main track; that he went to said place to examine the frost cocks on his engine "when she got there." and to see that the engine was in proper shape; that the frost cocks were on both sides of the engine, but he went between the tracks to examine the left-hand frost cock; that he could not very well examine the frost cocks while in the engine, because he could not see them; that when the frost cocks freeze up it is impossible to get water into the boiler; that he had received a letter from the superintendent of motive power three or four days after Christmas directing him to examine the frost cocks of his engine before leaving. It was very dark when he was injured. "You could not see anything hardly." He was facing northwest, looking for his engine. He could see the red light on the tank of his engine from where he was standing. "I was waiting for her to come down. Of course, I was not expecting anything else coming down the track, because of a rule of the company's. I saw the red light on the tank until an object got in front of me—that other engine come there. There was no man nor any lights of any kind on the end of the mail car that struck me. I don't think the bell on the engine that was pushing the mail car that struck me was ringing at or immediately before the time the car struck me. If it had been ringing, I think I would have heard it. I was looking and listening at the time, and did not hear it." Said mail car pushed by said engine was moving about

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10 or 12 miles an hour. The distance between the two main tracks was 7 or 8 feet. The mail car projected over the rail about 2 feet, leaving a space between the two cars of about 3 or 4 feet. "I had no notice or knowledge of the approach of said mail car until just about the time it struck me I saw it. It was so close that I could not get out of the way." The evidence of the appellee authorized the jury to find that the negligent acts of those in charge of said locomotive and train in violating the provisions of said ordinance was the proximate cause of appellee's injury. His sense of sight and hearing was good. He looked and listened, but did not see or hear the approaching engine and mail car. They were approaching him at a speed of from 10 to 12 miles an hour. At the same time his engine was backing east on the west-bound main track to be coupled on the west-bound train. The mail car was being pushed in the darkness without ringing the bell on the engine and without a signal light in charge of a competent person upon the rear or east end of said mail car. Under the circumstances it cannot be said that there was no evidence that, if the provisions of said ordinance above set out had been observed, appellee would not have been injured. The jury by the general verdict so found, and, as there was evidence to sustain such finding, under the well-settled rule we cannot disturb the same.

Appellant insists that appellee was off his engine in violation of a rule of the company when he was injured, and was therefore guilty of contributory negligence. The violation of a rule of the employer will not prevent a recovery by him, unless the violation of such rule proximately contributed to his injury. Appellee testified that he was at the place where he was injured for the purpose of examining the frost cocks of his engine when it backed up; that he had been directed by the superintendent of motive power to examine them before leaving. Whether or not he was guilty of contributory negligence in so being where he was when he was injured was a question for the jury, and it was properly submitted to them for determination, and we cannot say, from an examination of the evidence, that there was not evidence to sustain the finding that he was not guilty of contributory negligence, even if the burden of proof as to said issue were on him, instead of appellant. Appellant invokes the "look and listen rule," applicable to travelers at railroad crossings; but that rule does not apply in all its strictness to railroad employees, whose employment requires them to remain on or about the track. *Baltimore, etc., Ry. Co. v. Peterson, Adm'r*, 156 Ind. 364, 374, 59 N. E. 1044.

Appellant also contends that, as the evidence shows that appellee was in the employ of appellant as engineman from 1874 until January, 1901, when he was injured, he cannot recover in this action because the employers' liability act of 1893 impairs the obligations of said contract, and is therefore in violation of the provisions of the state and federal Constitutions which

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prohibit the enactment of laws which impair the obligation of contracts. There was no evidence of any contract between appellant and appellee, except that appellee entered the service of appellant in 1874 as a passenger engineman, and continued in said service until his injury in January, 1901. So far as the evidence shows, there was no express agreement between appellant and appellee, at the time he entered appellant's service or since, except such as might be implied from his entering said service. It may be said, therefore, as was said on the former appeal: "It does not appear that there was any such definitive agreement between the parties for the future as would warrant the assertion that any contract right of appellant had been impaired."

In the course of his testimony, and in explaining the character of his injury, appellee exhibited his injured foot, and testified that it was stiff at the ankle joint, and by movements of the foot showed the effects of the injury upon his ability to use it. Appellant insists that the court erred in permitting this to be done, because appellant was thereby deprived of its ability to present a complete record—citing *Consolidated Stone Co. v. Summit*, 152 Ind. 297, 305, 53 N. E. 235; *Westervelt v. National Paper Co.*, 154 Ind. 673, 681, 57 N. E. 552. Appellant was not deprived of any substantial right by the action of the court, and the record is complete. Said cases are not in point here. This court has held that such an exhibition of the injured limb was not error. *Indianapolis, etc., Co. v. Parker*, 100 Ind. 181, 199, 200, and authorities cited; *Citizens', etc., Ry. Co. v. Willobey*, 134 Ind. 563, 570, 33 N. E. 627; *Louisville, etc., Ry. Co. v. Wood*, 113 Ind. 544, 548-551, 14 N. E. 572, 16 N. E. 197.

There was no error in admitting in evidence the Carlisle Tables of Mortality. *Louisville, etc., Ry. Co. v. Miller*, 141 Ind. 533, 562, 563, 37 N. E. 343, and authorities cited.

Appellant says in its statement of points, in objecting to instructions, that "General instructions in negligence cases, which tell the jury that the plaintiff is entitled to recover, if they find from the preponderance of evidence that the material allegations of the complaint are proven, and which omit to say what the material allegations of the complaint are, which must be established to entitle the plaintiff to recover, are erroneous, because they leave it to the jury to determine questions of law and questions of fact." It has been held by this court that such instruction is not erroneous. *Southern, etc., Ry. Co. v. Peyton*, 157 Ind. 690, 700, 61 N. E. 722. The mere failure of a court to state the issues in the instructions to the jury is not reversible error. If a party desires a full and specific instruction as to what the issues are, it is incumbent on him to prepare such an instruction and present the same to the court at the proper time, with a proper request that it be given. If he fails to do this, he has no ground to complain that the court did not so

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state the issues to the jury. Elliott's Appellate Procedure, §§ 735, 736; Elliott's General Practice, § 896; Gillett's Criminal Law, §§ 906, 915; 2 Thompson on Trials, §§ 2338, 2339, 2341; Krack v. Wolf, 39 Ind. 88.

Appellant complains of an instruction that appellee, "under the circumstances developed by the evidence in this case, was required to exercise such care as persons of ordinary care and prudence would exercise under like circumstances." There was no error in giving said instruction. 1 Labatt, Master & Servant, § 329; Board, etc., v. Bonebrake, 146 Ind. 311, 317, 318, 45 N. E. 470; 4 Thompson on Negligence, p. 52, § 3769; 1 Shearman & Redfield on Negligence, p. 127, § 87. When several acts of negligence are sufficiently alleged in a complaint, it is not true, as claimed by appellant, that all of such acts must be proven to entitle the plaintiff to recover; but a recovery will be justified, if it is established that the injury complained of was the result of one or more of said acts of negligence. Chicago, etc., Ry. Co. v. Barnes, 164 Ind. 143, 149, 73 N. E. 91, and cases cited. In appellant's statement of points it is said that "the instructions given by the court of its own motion and at the request of appellee are indefinite, uncertain, and inapplicable to the evidence." It is not stated in the points how or in what respect any one of said instructions is indefinite, uncertain, and inapplicable to the evidence. Such an objection, like objections to evidence on the ground that the same is incompetent, immaterial, irrelevant, and does not tend to prove or disprove any issue in the case, are too general and indefinite to present any question. It is not sufficient to state in a point that the instructions given are erroneous, or that they are uncertain, indefinite, or inapplicable to the evidence, without pointing out why each instruction is erroneous, or how and in what respect the same is indefinite or uncertain, and citing authorities, if any, in support thereof. American Food Co. v. Halstead, 165 Ind. 633, 634, 635, 76 N. E. 251; Liggett v. Firestone, 102 Ind. 514, 26 N. E. 201; Smith v. McDaniel, 5 Ind. App. 581, 583, 32 N. E. 798. While a discussion or elaboration of a point is not proper in the statement of points, mere general statements, without specific and definite reasons specifically applied, present no question for decision.

Over the objection of the appellant the court permitted counsel for appellee to read the interrogatories to the jury and discuss the evidence in respect to the same. This action of the court was not erroneous. It was proper for counsel for appellee to read and comment upon the interrogatories, and to array the evidence necessary to be considered in answering the same. Gresley v. State, 123 Ind. 72, 75, 24 N. E. 332; Southern, etc., Ry. Co. v. Fine, 163 Ind. 617, 622, 623, 72 N. E. 589. Appellant, however, contends that counsel for appellee told the jury how to answer the interrogatories. The bill of exceptions shows that one of the counsel for appellee spoke of 8 interrogatories

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of the 133 submitted to the jury. If counsel for appellee told the jury how to answer any one of said 8 interrogatories, appellant was only entitled to have the jury sufficiently admonished without delay that such statement should not be considered. Counsel for appellant made no request for such admonition, but moved the court to take the case from and discharge the jury. This motion was properly overruled. As the court afterwards instructed the jury to answer the interrogatories according to the preponderance of the evidence, appellant has no just ground of complaint. *Southern, etc., Ry. Co. v. Fine*, 163 Ind. 622-624, 72 N. E. 589.

It is a settled rule of law that courts will not disturb a verdict on the ground of excessive damages, unless the damages are so excessive as to indicate that the jury acted from prejudice, partiality, or corruption. *Indiana Car Co. v. Parker*, 100 Ind. 181, 196, and cases cited; *Louisville, etc., Ry. Co. v. Miller*, 141 Ind. 533, 566, 37 N. E. 343; *Woollen's Trial Procedure*, §§ 4409, 4411. Under this rule we cannot say the damages assessed are excessive.

Counsel for appellant insists that Act March 4, 1893, p. 294, being section 7083 et seq., Burns' Ann. St. 1901 (the "Employers' Liability Act"), is in violation of the fifth amendment and the fourteenth amendment to the Constitution of the United States, because it deprives appellant of its property without due process of law; that said act violates the fourteenth amendment, because it denies to appellant the equal protection of the law, and abridges the privileges and immunities of appellant as a citizen of the United States. The fifth amendment to the Constitution of the United States operates in restriction of federal power, and has no application to the states, and therefore has no application to said act of 1893. *Thorington v. Montgomery*, 147 U. S. 490, 492, 13 Sup. Ct. 394, 37 L. Ed. 252; *Brown v. New Jersey*, 175 U. S. 172, 174, 20 Sup. Ct. 77, 44 L. Ed. 119, and cases cited; *Capital City Dairy Co. v. Ohio*, 183 U. S. 238, 245, 22 Sup. Ct. 120, 46 L. Ed. 171; *Fall Brook Irr. Dist. v. Bradley*, 164 U. S. 112, 158, 17 Sup. Ct. 56, 41 L. Ed. 369; *Barron v. Baltimore*, 7 Pet. (U. S.) 243, 247-252, 8 L. Ed. 672; 3 Rose's Notes on U. S. Reports, pp. 267-373, and cases cited; *Barton v. Kimmerly*, 165 Ind. 609, 610, 76 N. E. 250, and cases cited.

Corporations are not citizens of the United States within the meaning of that part of the fourteenth amendment which provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." Therefore, that provision of said amendment cannot affect the validity of said act of 1893. *Orient Ins. Co. v. Daggs*, 172 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 552; 3 Rose's Supp. to Notes to U. S. Repts., p. 990; *Waters-Pierce Oil Co. v. Texas*, 177 U. S. 28, 45, 46, 20 Sup. Ct. 518, 44 L. Ed. 657. It has been held by this court that, while corporations

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are persons within the meaning of the fourteenth amendment of the Constitution of the United States as applied to railroads said employers' liability act is not in violation thereof, nor in violation of the Constitution of this state. *Pittsburgh, etc., Ry. Co. v. Montgomery*, 152 Ind. 1, 49 N. E. 582, 69 L. R. A. 875, 71 Am. St. Rep. 301, and cases cited; *Indianapolis, etc., Ry. Co. v. Houlihan*, 157 Ind. 494, 60 N. E. 943, 54 L. R. A. 787, and cases cited. In *Tullis v. Lake Erie Ry. Co.*, 175 U. S. 348, 20 Sup. Ct. 136, 44 L. Ed. 192, the Supreme Court of the United States held that, as applied to railroad corporations, said employers' liability act of this state was not in violation of the fourteenth amendment to the Constitution of the United States—citing *Missouri Pacific Ry. v. Mackey*, 127 U. S. 205, 8 Sup. Ct. 1161, 32 L. Ed. 107; *Minn. & St. Louis Ry. Co. v. Herrick*, 127 U. S. 210, 8 Sup. Ct. 1176, 32 L. Ed. 109; *Chicago, etc., Ry. Co. v. Pontius*, 157 U. S. 209, 15 Sup. Ct. 585, 39 L. Ed. 675; *Pierce v. Van Dusen*, 47 U. S. App. 339, 24 C. C. A. 280, 78 Fed. 693; *Orient Ins. Co. v. Daggs*, 177 U. S. 557, 19 Sup. Ct. 281, 43 L. Ed. 553, which sustained the constitutional validity of like statutes of other states. It has been uniformly held by the courts of last resort that such laws are constitutional. *Mo. Pac. Ry. Co. v. Haley*, 25 Kan. 35, 53, and cases cited; *Union Pac. Ry. Co. v. Harris*, 33 Kan. 298, 302, 6 Pac. 571; *Johnson v. St. Paul Ry. Co.*, 43 Minn. 222, 45 N. W. 156, 8 L. R. A. 419; *Herrick v. Minn., etc., Ry. Co.*, 16 N. W. 413, 31 Minn. 11, 47 Am. St. Rep. 771, 775, 776; *Ditberner v. Chicago, etc., Ry. Co.*, 47 Wis. 138, 2 N. W. 69; *Callahan v. St. Louis Ry. Co.*, 170 Mo. 473, 71 S. W. 208, 94 Am. St. Rep. 746, and cases cited, 60 L. R. A. 249; *Powell v. Sherwood*, 162 Mo. 605, 63 S. W. 485; *Reno's Employers' Liability Acts* (2d. Ed.) § 122, and cases cited; *Dresser's Employers' Liability*, §§ 29-33, and cases cited; 2 *Labatt, Master & Servant*, §§ 643, 644, 645, 646, and notes.

Appellant contends, however, that the statute in question violates said constitutional provision, because it only applies to corporations operating railroads, and not to persons engaged in operating railroads. Substantially the same objection was made in the case of *Pittsburgh, etc., Ry. Co. v. Montgomery*, supra, and this court, in that case, citing *Bucklew v. Iowa Central Ry. Co.*, 64 Iowa, 611, 21 N. W. 103, and other cases above cited, held the law valid. The statute in question was not only held valid as to railroad companies in the *Montgomery Case*, supra, but it was also held that objection to its validity could not be made by such companies on the ground that it embraced all corporations except municipal, and that there were some corporations whose business would not bring them within the reason of the classification; that is, that said employers' liability act was capable of severance, and thus, by putting railroads in a class by themselves, it might be sustained as to railroads, regardless of its unconstitutionality as to other corporations.

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The classification of railroads by themselves was held proper in the cases above cited on account of the dangerous and hazardous character of the business of operating railroads. This classification is based, not on the difference in employers, but upon a difference in the nature of the employment. As was said in Indianapolis, etc., Ry. Co. v. Houlihan, 157 Ind. 494, 501, 60 N. E. 943, 54 L. R. A. 787: "The classification is made on the basis of the peculiar hazard in railroading, relates directly to the object to be accomplished, and applies to all employers within the class. To separate railroading from other business was not an unconstitutional discrimination, because the dangers (the basis of classification) do not arise from the same sources." True, the employers' liability act of this state provides that "every railroad or other corporation, except municipal, operating in this state shall be liable for damages for personal injuries suffered by any employee," etc. But, in 2 Lewis' Sutherland on Statutory Construction, § 347, it is said to be indispensable to a correct understanding of a statute to inquire, first, what is the subject of it—what object is intended to be accomplished by it. When the subject-matter is once clearly ascertained, and its general intent, a key is found to its intricacies. General words may be restrained to it, and those of narrower import may be expanded to embrace it, to effectuate that intent. When that intention can be collected from the statute, words may be modified, altered, or supplied, so as to obviate any repugnancy or inconsistency with such intention. The subject-matter of the statute in question here, and its intent and purpose so far as applicable to railroads, were to protect employees from the peculiar dangers and hazards in railroading. Union, etc., Ry. Co. v. Houlihan, and cases cited supra. Under the decisions cited the character of the employers is not a controlling factor. The statute is to be given at least a reasonable interpretation, one that will carry into effect the legislative intent. As we have shown, the basis of the classification of railroads by themselves was the hazardous and dangerous character of the employment of operating railroads, and this does not depend upon whether railroads are operated by corporations or by one or more persons.

If the character of the employer within the meaning of the statute is not important—and the nature of the employment is the test to be applied in construing—the expression "every railroad or other corporation operating within this state," as applied to railroads, should, under the rule above stated, be enlarged and expanded so as to include any person, company, or corporation engaged in operating a railroad in this state. This interpretation is sustained by the title of said act, which, under our Constitution, "shall embrace but one subject and matters properly connected therewith, which subject must be expressed in the title." Under such a constitutional provision the language of the act should be construed in view of its title and its lawful

purpose. 2 Lewis' Sutherland on Statutory Construction, § 340; Cooley's Constitutional Limitations (7th Ed.) p. 202. Said title reads "an act regulating liability of railroads and other corporations, except municipal, for injuries to persons employed by them." The subject of this act as expressed in the title, so far as railroads are concerned, is the regulation of their liability to their employees, regardless of whether they are operated by persons, companies, or corporations. The employers' liability act of Iowa provided that "every corporation operating a railway shall be liable for all damages sustained by any person, including employees of such corporations, in consequence of the neglect of agents by any mismanagement of the engineers or other employees of the corporation," etc. Code Iowa 1873, § 1307. The objection made by appellant to the statute in this case seems to have been made to said Iowa statute in *Bucklew v. Iowa Central Ry. Co.*, supra, decided in 1884, before the enactment of the statute in this state, where the Supreme Court of Iowa said, on pages 610, 611, of 64 Iowa, page 107 of 21 N. W., "that the business of operating a railroad is peculiarly hazardous and dangerous to employees engaged in the operation of the road must be admitted. Counsel have not called our attention to any business which is equally hazardous, and, as the statute is applicable to all corporations or persons engaged in operating railroads, it seems to us that it does not discriminate in favor of or against any one." In Minnesota the statute provided that "every railroad corporation owning or operating a railroad in this state shall be liable for all damages sustained by an agent or servant thereof by reason of the negligence of another agent or servant," etc. The Supreme Court in that state said, in *Schus v. Powers-Simpson Co.*, 85 Minn. 447, 452, 453, 89 N. W. 68, 70, 69 L. R. A. 887, "that as the spirit and purpose of the law was the protection of employees of employers engaged in a hazardous and dangerous work, though the literal language thereof limits its operation to railroad corporations, we hold that it applies to any corporation or person engaged in operating a line of railroad, incident to which operation are the dangers and hazards to employees the Legislature intended to provide against." The spirit and purpose of the statute must be looked to in interpreting the statute in controversy. As we have seen, the spirit and purpose of the employers' liability act of this state, so far as railroads are concerned, was the protection of employees engaged in the dangerous and hazardous work of operating railroads in this state, and we hold that it applies to every corporation, company, copartnership, or person engaged in the dangerous and hazardous business of operating a railroad, and their employees who are engaged in such dangerous and hazardous work.

Under the fifth clause of rule 22 (55 N. E. vi.), no alleged error or point not contained in appellant's statement of points can be raised afterwards, either by reply brief, or in oral or printed argument, or on petition for rehearing, but will be con-

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sidered waived. Under rule 24 (55 N. E. vi.), the brief may be followed by an argument, which shall be confined to a discussion and elaboration of the points contained in the briefs.

Having determined all the questions not waived, and finding no available error, the judgment is affirmed.

PITTSBURG, J., E. & E. R. CO. v. WAKEFIELD HARDWARE CO.

(Supreme Court of North Carolina, Nov. 13, 1906.)

[55 S. E. Rep. 422.]

Attachment—Wrongful Attachment—Damages—Measure—Detention of Attached Property.—Where cars are wrongfully attached, evidence of profits which the owner might have made during the period of their detention from hiring them out, as was its custom, may not be shown, as this would be speculative damages, and the true measure of damages is the interest on their value, increased or diminished, as the case may be, by the difference between their deterioration if in daily use, and their deterioration while wrongfully tied up, provided the owner was not able to avoid all injury from the attachment by simply giving bond.

Same—Evidence—Duty to Lessen Injury.*—In an action for damages for detention of cars by attachment, defendant may show that plaintiff could, for a small sum, have secured a replevin bond, it being its duty to do what it reasonably could to lessen the injury.

Malicious Prosecution—Probable Cause—Evidence.—Evidence, in an action for malicious prosecution of an action with attachment, held sufficient to go to the jury on the question of probable cause.

Same—Malice—Evidence.—Evidence, in an action for malicious prosecution of an action with attachment, that defendant laid all the facts before counsel of high standing and sued out the attachment under his advice is evidence to rebut malice.

Process—Abuse of Process—Liability of Party.—Plaintiff in attachment is not liable for abuse of process because of the levy on an excessive quantity of property, unless it directed, advised, or encouraged such acts.

Same—Distinguished from Malicious Prosecution—Abuse of Process.—An action for malicious prosecution is distinguished from one for abuse of process in that, in the former, malice, want of probable cause, and termination of the former proceedings must be shown; and in the latter, none of these, but an ulterior purpose and an act in the use of the process not proper in the regular prosecution of the proceeding must be shown.

Appeal from Superior Court, Guilford County; W. R. Allen, Judge.

Action by the Pittsburg, Johnstown, Ebensburg & Eastern Railroad Company. From the judgment, both parties appeal. Affirmed on plaintiff's appeal. Reversed on defendant's appeal.

This case was here (135 N. C. 73, 47 S. E. 234), when a de-

*See foot-notes appended to *Ingraham v. Pullman Co.* (Mass.), 19 R. R. R. 739, 42 Am. & Eng. R. Cas., N. S., 739; *Southern Ry. Co. v. Cunningham* (Ga.), 18 R. R. R. 374, 41 Am. & Eng. R. Cas., N. S., 374.

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murrer for misjoinder was sustained because the surety on the attachment bond had been joined as defendant. It was again here (138 N. C. 174, 50 S. E. 571), when a demurrer to the complaint was overruled. The defendant had instituted an action against the Coke & Coal Company, a corporation of this state, for the recovery of \$415 for car material, and joined the plaintiff herein, a railroad company incorporated in Pennsylvania, as codefendant. The two companies had at that time the same officers and nearly the same stockholders, and the material had been used on the latter's cars. The complaint alleged that the material was bought for said railroad company in fact as an undisclosed principal. In said attachment, 10 of the defendant's cars were attached, and, it not offering to give bond, the said 10 cars were held two years, when the attachment was dissolved. This action was brought for damages, alleging malice and want of probable cause, and that the attachment of the 10 cars was excessive and an abuse of the process of the court. Both plaintiff and defendant appealed.

J. T. Morehead, W. H. Carroll, and Scott & McLean, for plaintiff.

Taylor & Scales, for defendant.

Plaintiff's Appeal.

CLARK, C. J. (after stating the case). The plaintiff sought to show that for the 10 cars attached it should recover what the cars would have earned by way of rental or car toll. It was in evidence that the plaintiff's road is only 17 miles long, but that it owns a large stock of cars and its principal business was the hiring on mileage of its freight and coal cars used on other roads. In short, as its counsel somewhat felicitously expressed it, its chief business was that of a "railroad livery stable," hiring out conveyances. His honor properly excluded the evidence of profits which the plaintiff might have made from hiring its cars, because that would be speculative damages. *Sharpe v. Railroad*, 130 N. C. 614, 41 S. E. 799. The true measure of damages is the interest upon the value of the cars, increased or diminished, as the case might be, by the difference between the deterioration in the cars if in daily use and their deterioration while wrongfully tied up, provided of course the plaintiff could not have avoided all injury from the attachment by simply giving bond—as it is shown that it was amply able to do—and retaining possession of its cars.

No error.

Defendant's Appeal.

It was error to refuse to admit the testimony of the agent of the company which was surety on the prosecution bond in this action, that, for a payment of \$10, it would have signed a replevy bond to secure release of the 10 cars when attached. Though it may not be the duty of a defendant in all cases to execute a replevy bond, it would be preposterous to justify nonaction whereby

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the plaintiff claims it has lost \$4,750 rental of cars when it was a perfectly solvent company, owing no debts, as its president testified, and could, at a petty expense and probably without any at all, have given bond and retained possession of its cars. "The rule, in brief, is that, in cases of contract as well as in tort, it is generally incumbent upon an injured party to do whatever he reasonably can to improve all reasonable and proper opportunities to lessen the injury. * * * He must not remain supine, but should make reasonable exertions to help himself, and thereby reduce his loss and diminish the responsibility of the party in default to him." Note to *Wright v. Bank*, 6 Am. St. Rep. 365. Where a mule was wrongfully taken it was held that the injured party should have bought another, and could not recover the profits of the crop he would have made, if the mule had not been taken. *Sledge v. Reid*, 73 N. C. 440.

The court below erred in instructing the jury that "if they believed the evidence to answer the first issue 'Yes.' That issue was, 'did the defendant wrongfully, and without probable cause, cause to be issued and levied a warrant of attachment upon the property of the plaintiff?' There was ample evidence to submit to the jury upon the question of probable cause. There was the testimony of the general manager of the defendant that the party who bought the goods told him they were for the use of, and bought for the account of, the plaintiff; that he had no reason whatsoever to disbelieve this statement; that the action was instituted by the defendant in the utmost good faith, believing that the plaintiff verily owed the debt for which the property was attached; that, notwithstanding this belief, out of the abundance of caution, he submitted honestly all the facts to his counsel, who advised him that he had a cause of action against the plaintiff; that no steps were taken except such as were advised by his attorney, that as for attaching more property than the amount of his claim would warrant, he had no idea what property the sheriff had attached under, and by virtue of, the writ, and that his only cause for taking a nonsuit at the time of the trial of the action was his inability to secure the attendance, as a witness, of the party who bought the goods." The defendant had laid all the facts before counsel of high standing in the profession, and had sued out the attachment under his advice. This is evidence to rebut the allegation of malice. *Smith v. B. & L. Asso.*, 116 N. C. 73, 20 S. E. 963, and there are many authorities holding that it is evidence, also, of probable cause. See cases collected in note 93 Am. St. Rep. 461. This action furthermore cannot be maintained for malicious prosecution, if as the jury have found, there was no malice. *Railroad v. Hardware Co.*, 138 N. C. 174, 50 S. E. 571.

The only ground for an action for abuse of process is the levy on an excessive number of cars for the alleged purpose of forcing payment of an alleged debt, preferably to submitting to loss and inconvenience by the attachment. There was certainly evidence,

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above set out, in denial of this, and it was error in any aspect of the case to instruct the jury to answer the first issue "Yes." If the officer levied, as it seems that he did, on an excessive quantity of property, the plaintiff in the attachment was not liable for the abuse unless it had in some way directed, advised, or encouraged such act. 19 Am. & Eng. Enc. (2d Ed.) 630. This being denied, raised an issue for the jury.

It may be as well to note here the distinction between an action for malicious prosecution and an action for abuse of process. In an action for malicious prosecution there must be shown (1) malice, and (2) want of probable cause, and (3) that the former proceeding has terminated. *Railroad v. Hardware Co.*, 138 N. C. 174, 50 S. E. 571. In an action for abuse of process it is not necessary to show either of these three things. By an inadvertence it was said in the case last cited that want of probable cause must be shown. "If process either civil or criminal is willfully made use of for a purpose not justified by the law, this is an abuse for which an action will lie." 1 Cooley, Torts (3d Ed.) 354. "Two elements are necessary: First, an ulterior purpose; second, an act in the use of the process not proper in the regular prosecution of the proceeding. *Id.* 355; 1 Jaggard, Torts, § 203; Hale on Torts, § 185. "An abuse of legal process is where it is employed for some unlawful object not the purpose intended by law. It is not necessary to show either malice or want of probable cause, nor that the proceeding had terminated, and it is immaterial whether such proceeding was baseless or not." *Mayer v. Walter*. 64 Pa. 283. The distinction has been clearly stated. *Jackson v. Tel. Co.*, 139 N. C. 356, 51 S. E. 1015, 70 L. R. A. 738.

Error.

CHARLES K. OFFIELD, Plff. in Err., *v.* NEW YORK, NEW HAVEN, & HARTFORD RAILROAD COMPANY.

(Argued and submitted October 25, 1906. Decided December 3, 1906.)

[27 Sup. Ct. Rep. 72.]

Error to State Court—Federal Question.—The contention that the proceedings taken under Conn. Gen. St. §§ 3694, 3695, by a railway company which is the lessee of another railway, and the owner of three fourths of its stock, to condemn the outstanding shares owned by a person who refuses to agree to the terms of purchase, violate the due process of law clause of the 14th Amendment to the Federal Constitution, and impair contract obligations, is not so frivolous as to require the dismissal of a writ of error from the Supreme Court of the United States to a state court.

Constitutional Law—Due Process of Law—Condemnation for Public Use.—The improvement of the New Haven & Derby Railroad is a public use for which the New York, New Haven, & Hartford Railroad Company, which is the lessee of the former road, and the owner of three fourths of its stock, may proceed under Conn. Gen. St. §§ 3694, 3695, without violating the due process of law clause of the 14th Amendment to the Federal Constitution, to condemn the out-

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standing shares owned by a person who refuses to agree on the terms of purchase.

Constitutional Law—Impairing Contract Obligation.—Contract obligations are not impaired by the proceedings taken under Conn. Gen. St. §§ 3694, 3695, by the New York, New Haven, & Hartford Railroad Company, which is the lessee of the New Haven & Derby Railroad and the owner of three fourths of its stock, to condemn the outstanding shares owned by a person who refuses to agree on the terms of purchase.

In Error to the Supreme Court of Errors of the State of Connecticut to review a judgment which affirmed a judgment of the Superior Court of New Haven County, in that state, for the condemnation of certain shares of railway stock owned by a person who refuses to agree to the terms of purchase offered by a railway corporation which has acquired three fourths of such stock. Affirmed.

See same case below, 78 Conn. 1, 60 Atl. 740.

The facts are stated in the opinion.

Messrs. Edward H. Rogers, W. H. H. Miller, and Charles K. Bush, for plaintiff in error.

Messrs. George D. Watrous and Edward G. Buckland, for defendant in error.

MR. JUSTICE MCKENNA delivered the opinion of the court.

This writ of error brings up for review a judgment of the supreme court of errors of the state of Connecticut, rendered in a proceeding under the statutes of that state for the condemnation of two shares of stock owned by plaintiff in error in the New Haven & Derby Railroad Company.

There was a demurrer to the application, which was overruled by the advice of the supreme court of errors, the judgment on demurrer having been reserved, under the practice of the state, for the advice and consideration of that court. 77 Conn. 417, 59 Atl. 510. Upon the hearing judgment was rendered for defendant in error, which was affirmed by the supreme court of errors. 78 Conn. 1, 60 Atl. 740.

Defendant in error is the lessee of the New Haven & Derby Railroad Company, and has acquired all of the shares of stock of the latter road except the two shares owned by plaintiff in error.

That the lease and acquisition of stock are valid under the laws of the state is decided by the supreme court of errors, and it is sought by proceedings under review to obtain the two shares of stock owned by plaintiff in error, under §§ 3694 and 3695 of the General Statutes of Connecticut, which are as follows.

"Sec. 3694. In case any railroad company, acting under the authority of the laws of this state, shall have acquired more than three fourths of the capital stock of any steamboat, ferry, bridge, wharf, or railroad corporation, and cannot agree with the holders of outstanding stock for the purchase of the same, such railroad company may, upon a finding by a judge of the superior court that such purchase will be for the public interest, cause such out-

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standing stock to be appraised in accordance with the provisions of § 3687. When the amount of such appraisal shall have been paid or deposited as provided in said section, the stockholder or stockholders whose stock shall have been so appraised shall cease to have any interest therein, and on demand shall surrender all certificates for such stock, with duly executed powers of attorney for transfer thereon, to be corporation applying for such appraisal.

“Sec. 3695. If any person holding a minority of the shares of stock in any corporation referred to in § 3694 cannot agree with the railroad company owning three fourths of such stock for the purchase of his shares, he may cause the same to be appraised in accordance with the provisions of § 3687. When such appraisal has been made and recorded in the office of the clerk of the superior court of any county where such railroad company operates a railroad, and the certificates for such stock, with duly executed powers of attorney for transfer thereon, have been deposited with such clerk for such railroad company, such appraisal shall have the effect of a judgment against such company and in favor of the holder of such stock, and at the end of sixty days, unless such judgment is paid, execution may be issued.”

The purpose of the acquisition of the stock is to enable defendant in error to improve the New Haven & Derby Railroad.

It is contended by plaintiff in error (1) that the purpose for which the stock is sought to be obtained is not a public use. (2) That defendant in error has the power and authority to make the improvements mentioned in its application, which would be as advantageous as taking the stock. (3) The proceedings and statutes are in violation of the due process clause of the 14th Amendment to the Constitution of the United States, and impair the contract rights of plaintiff in error as stockholder of the New Haven & Derby Railroad Company, and his rights in, under, and by virtue of, the lease to defendant in error.

These contentions raise a Federal question and we cannot say that it is frivolous. The motion to dismiss is therefore denied.

(1.) The power of the state to declare uses of property to be public has lately been decided in *Clark v. Nash*, 198 U. S. 361, 49 L. Ed. 1085, 25 Sup. Ct. Rep. 676, and in the case of *Strickley v. Highland Boy Gold Min. Co.*, 200 U. S. 527, 50 L. Ed. 581, 26 Sup. Ct. Rep. 301. These cases exhibit more striking examples of the power of a state than the case at bar. In the first case the statute of the state permitted an individual to enlarge the ditch of another to obtain water for his own land; in the second case the statute authorized the condemnation of a right of way to transport ore from a mine to a railroad station. In the first case it was said that the public policy of the state, declaring the character of use of property, depends upon the facts surrounding the subject. In the second case it was said, commenting on the first, “it proved that there might be excep-

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tional times and places in which the very foundations of public welfare could not be laid without requiring concessions from individuals to each other upon due compensation, which, under other circumstances, would be left wholly to voluntary consent." The case at bar does not need the support of such broad principles. The ultimate purpose of defendant in error in the case at bar is the improvement of the New Haven & Derby Railroad, which "connects [we quote from the opinion of the supreme court of errors, 77 Conn. 419, 59 Atl. 511] at New Haven, on the east, with four, and at its western terminals with two, important railroad lines owned by the plaintiff [defendant in error] and forms a link in an all-rail route between Boston and the West, which is the only one controlled by the plaintiff, and the only one of any kind controlled by it over which goods can be transported with assured despatch in all weathers and at all seasons." In this purpose the public has an interest, and to accomplish it the court applied the statute. The court observed: "To develop this route so as best to serve the public interest requires the laying of additional tracks on the New Haven & Derby Railroad and other extensive and very costly improvements. The lessor company has neither means nor credit whereby this can be effected on advantageous terms. The plaintiff could and will effect it, and at much less cost, if it can acquire the two outstanding shares of the stock of the lessee. They are owned by the defendant, who refuses to agree on terms of purchase."

(2) The contract which it is contended was impaired is the lease of the New Haven & Derby Railroad by defendant in error. The lease is for a period of ninety-nine years from July 1, 1892, at a rental of 4 per cent. per annum upon the capital stock, together with the payment of taxes, assessments, and interest upon the funded debt. Associated with this contention there is another, more general, to the effect that the statute impairs the contract rights of plaintiff in error as a stockholder of the New Haven & Derby Railroad Company. We do not find it necessary to give precise and separate discussion to these contentions. They seem to us to be but parts or incidents of the contention that the stock is sought for a private use. If they are not incidents of that, they are answered and opposed by the case of *Long Island Water Supply Co. v. Brooklyn*, 166 U. S. 685, 41 L. Ed. 1165, 17 Sup. Ct. Rep. 718. Whatever value the lease gives the shares of stock will be represented in their appraisalment.

Judgment affirmed.

In re BRISTOL COUNTY.

(Supreme Judicial Court of Massachusetts, Bristol, Nov. 27, 1906.)

[79 N. E. Rep. 339.]

Bridges—Construction—Apportionment of Cost—Special Statute.—The apportionment of the cost of building a certain bridge was by St. 1893, p. 1064, c. 368, § 6, to be made among a county and certain cities and towns to be especially benefited. Afterwards it was found that the work was costing more than expected, and that a railroad grade crossing on one side should be changed. A legislative board (Resolves of 1899, c. 99, p. 589) having so recommended, a new plan was adopted (St. 1900, p. 411, c. 439, § 6), whereby the city directly interested was given charge, a change to an overhead crossing ordered at a greatly increased cost, and a new scheme adopted for payment for the part unbuilt, under which the apportionment upon the county was a certain sum "to be apportioned * * * between the cities and towns in the county * * * as provided in said section 6" (of the act of 1893). Held, that the reference to the apportionment of 1893 did not require the county to share with the cities and towns in paying such sum, but only required its apportionment among cities and towns especially benefited.

Railroads—Overhead Bridge—Contribution to Cost.*—St. 1900, p. 411, c. 439, § 6, requiring a railroad to pay a portion of the cost of an improvement in a bridge, whereby it crosses over the railroad rather than at grade, and which provided for two abutments on the old way between the river and the railroad, is constitutional, as beneficial to the railroad, though the old way is not technically abolished.

Bridges—Cost Not Determined.—St. 1906, p. 196, c. 238, providing for the apportionment of such cost of a bridge as had been determined, and for the apportionment of the cost not determined "by declaring in what percentage such cost shall hereafter be apportioned when it has been ascertained and paid," being silent as to the method of apportioning the cost not determined, requires the same method of apportionment for such part as for that determined.

Interest—Verdicts and Awards—Construction of Bridge—Apportionment of Cost—Special Statute.—St. 1893, p. 1062, c. 368, providing for the apportionment among a county and others, by commissioners appointed by the court, of the cost of building a certain bridge chargeable in the first instance on the county, made no provision for the payment of interest from the time of the filing of the commissioners' report to entry of judgment. Rev. Laws, c. 177, § 8, provides for interest from the time of an award by county commissioners, a committee, or referees, or from a report by auditors or master in chancery, or verdict by a jury. Held that, in a proceeding under the statute of 1893, no interest was allowable between the report of the commissioners and judgment.

Report from Superior Court, Bristol County; Wm. B. Stevens, Judge.

Petition by the county of Bristol for the appointment of commissioners to apportion among the city of New Bedford and

*See generally, foot-notes appended to Illinois Cent. R. Co. v. Swalm (Miss.), 11 R. R. R. 118, 34 Am. & Eng. R. Cas., N. S., 118; Chicago, etc., R. Co. v. People (Ill.), 14 R. R. R. 62, 37 Am. & Eng. R. Cas., N. S., 62; City of Harriman v. Southern Ry. Co. (Tenn.), 13 R. R. R. 373, 36 Am. & Eng. R. Cas., N. S., 373; foot-notes appended to Western Ry. of Ala. v. Cleghorn (Ala.), 17 R. R. R. 216, 40 Am. & Eng. R. Cas., N. S., 216 (duty to construct and maintain crossings).

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others interested the cost of building a certain bridge authorized by statute. Judgment was ordered on report of the commissioners, and questions of law reported to the Supreme Judicial Court. Report modified.

Fredk. S. Hall and *Jas. M. Swift*, for petitioner.

Wm. B. Perry, for city of New Bedford.

Hugo A. Dubuque, for city of Fall River.

Chas. W. Clifford, for town of Fairhaven.

Oliver Prescott, Jr., for Union St. Ry. Co.

Wm. C. Parker, for town of Dartmouth.

Perry, Jenney & Potter, for town of Acushnet.

J. H. Benton, Jr., for Old Colony R. Co.

KNOWLTON, C. J. This is a petition by the county commissioners of the county of Bristol for the appointment of commissioners to apportion the cost of the construction of a bridge across Acushnet river, between the city of New Bedford and the town of Fairhaven, and the expense of the care and maintenance of this bridge, among the parties liable therefor. The statutes under which the bridge was built are St. 1893, p. 1062, c. 368; St. 1894, pp. 214, 741, cc. 239, 530; St. 1897, p. 157, c. 200; St. 1898, p. 330, c. 387; St. 1899, p. 511, c. 460; St. 1900, p. 409, c. 439. A report of the joint board of railroad commissioners and harbor and land commissioners to the Legislature under chapter 99, p. 589, of the Resolves of 1899 was also considered in connection with the statutes.

Commissioners were appointed who heard the parties and made a report which was accepted and affirmed by the superior court. Judgment was ordered thereon, and certain questions of law were then reported to this court.

The most important of these questions is whether, under St. 1900, p. 411, c. 439, § 6, the \$220,000 which is to be apportioned upon the county of Bristol and then "to be apportioned by said commissioners between the cities and towns in the county of Bristol as provided in said section 6"—that is, as provided in St. 1893, p. 1964, c. 368, § 6—is to be all apportioned among the "towns and cities in said county which are or will be specially benefited," or is to be apportioned among said towns and cities and the county of Bristol. The apportionment of the cost that accrued under St. 1893, was to be made among the county of Bristol and the cities and towns in the county of Plymouth and the county of Bristol that should be found to be specially benefited. By St. 1899, p. 511, c. 460, a limitation was put upon the liability of towns and cities in the county of Plymouth. It was then found that a very much larger sum had been expended than the cost as originally estimated, and that a great deal more was needed to complete the bridge. The original plan was for a bridge which would leave the crossing of the railroad on the New Bedford side at grade, but it was then thought important to abolish this grade crossing. Accordingly work was

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stopped under the legislative Resolve of 1899, p. 589, c. 99, and the board of railroad commissioners and the board of harbor and land commissioners were constituted a joint board to consider the matter and to report to the next general court various specified facts important in determining what should be done. After consideration of the report made under this resolve, St. 1900, p. 409, c. 439, was passed, which adopted a new plan for future action. The completion of the bridge was taken out of the hands of the county commissioners and entrusted to the city of New Bedford, to be carried out according to plans, specifications and requirements to be furnished by the joint board above mentioned, following the report previously made to the Legislature. This report recommended the abolition of the grade crossing and the construction of the bridge overhead at an expense greatly exceeding that of the grade crossing. The scheme relative to the payment of the cost of that part of the bridge remaining to be built was entirely changed. The apportionment was to be "upon the county of Bristol two hundred and twenty thousand dollars to be apportioned by said commissioners between the cities and towns in the county of Bristol as provided in said section six" of the former statute and certain percentages were put upon the commonwealth of Massachusetts, upon the Old Colony Railroad Company, upon the Union Street Railway Company, and upon the town of Fairhaven, and the city of New Bedford was required to pay the balance. By the terms of the former statute the county was to share the expense incurred under it with the cities and towns specially benefited. That expense, as ascertained and reported in the year 1899, was more than \$800,000. It was evidently the purpose of the Legislature to leave the expense of the new construction to be paid entirely by the parties specially benefited, on the ground that the part of \$800,000 which would ultimately rest as a burden upon the taxpayers of the county, including inhabitants of cities and towns that would not be specially benefited, was as much as ought to be paid by them. So we have the provision putting \$220,000 upon the county and then requiring it to be apportioned "between the cities and towns in the county of Bristol." In this last apportionment the county is left out, and the words, "as provided in said section six," have no other meaning than to incorporate the requirement of that section that the apportionment shall include only such cities and towns as are specially benefited. We are of opinion that the ruling of the commissioners and the court upon this part of the statute was correct.

The Old Colony Railroad Company raises a question as to the 33 per cent. of the balance above the \$220,000 which the statute requires it to pay. We do not exactly understand the objection. It is not argued that the statute is unconstitutional. It provided for a very important change in the public travel at the crossing, which is beneficial to the corporation as well as to the public.

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The public travel is now carried over the railroad instead of crossing it at grade. Whether the public crossing at grade is technically abolished or not in view of the fact that there are two abutters on the old way between the railroad and the river, there is no doubt of the constitutional authority of the Legislature to impose a part of the expense of this change upon the railroad company. *Norwood v. New York & New England Railroad Company*, 161 Mass. 259, 37 N. E. 199. The ruling on this point was correct.

The petition for the appointment of commissioners to apportion the cost was filed on July 6, 1904. After hearings at length before the commissioners, it was found that the apportionment could not be completed because a part of the cost had not been ascertained, owing to the pendency of suits for the determination of damages to land. Thereupon St. 1906, p. 196, c. 238, was passed, providing for an apportionment of such cost as had been determined and paid, and "for the apportionment of such part of the cost as had not been ascertained or paid at the date of its report, by declaring in what percentage such cost shall hereafter be apportioned when it has been ascertained and paid." This statute is silent in regard to the manner in which this last apportionment shall be made, and the question arises whether it changes the provisions by which the commissioners would have been governed if this cost had been determined previously. There is nothing to indicate an intention of the Legislature to make such a change. There was no change unless by the failure to state expressly in the second section, by what principles the commissioners should be governed in making the apportionment, the statute left them to adopt any method that they should deem best. If this failure to say anything on the subject repealed the provisions of the law applicable to the apportionment of this cost had it been determined previously the commissioners might put a large part of it upon the county of Bristol, or distribute it in any way in which the Legislature may distribute such expenses. We do not think this is the true meaning of the statute. The natural construction of it is that the apportionment should be made as it would have been if the cost had been determined and paid, the only purpose of the Legislature being to permit the apportionment before the ascertainment of the amount.

There is no doubt that this cost, if it had been determined previously, would have been a part of that to be paid under St. 1900, p. 411, c. 439, § 6, in the proportions of 12 per cent. by the commonwealth, 33 per cent. by the Old Colony Railroad Company, 10 per cent. by the Union Street Railway Company, 5 per cent. by the town of Fairhaven, and 40 per cent. by the city of New Bedford, subject to a limitation of the aggregate amount payable by these parties, respectively, except the last, and to a possible increase upon the city of New Bedford by reason of this limitation. We are of opinion that the apportion-

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ment should be modified so as to make the percentages conform to this part of the statute.

A single question remains as to interest upon the amounts payable to the county of Bristol for the time from the filing of the report to the time of the entry of the judgment. This question arises under St. 1893, p. 1064, c. 368. This statute makes no provision for a payment of interest during this period. It is not contended that interest can be allowed as damages on the ground that the money is wrongly detained after it becomes payable, for it cannot be paid until after the judgment is entered. It is not within the language of Rev. Laws, c. 177, § 8, which relates only to awards of county commissioners, committees or referees, or reports of auditors or masters in chancery, or verdicts of juries. This statute was in force at the time of the decision in *Needham v. Wellesley*, 139 Mass. 376, 31 N. E. 732, which in this particular is almost identical with the present case and which holds that such interest cannot be charged. See, also, *Hendrick v. West Springfield*, 107 Mass. 541. *Bowers v. Hammond*, 139 Mass. 360, 31 N. E. 729. The allowance of this interest was erroneous.

The determination of the commissioners in regard to the maintenance and support of the bridge cannot be revised in this court. The report is to be modified as to the apportionment of the cost not yet determined, and the interest referred to is to be disallowed.

So ordered.

**FAIR HAVEN & WESTVILLE RAILROAD COMPANY, Plff. in Err.,
v. CITY OF NEW HAVEN.**

(Argued November 5 and 6, 1906. Decided December 3, 1906.)

[27 Sup. Ct. Rep. 74.]

Error to State Court—Scope of Review—Questions Not Involved in the Record.—A Federal question respecting the validity of a paying assessment against a street railway company is not open on writ of error from the Supreme Court of the United States to a state court, where the latter court based its ruling that the question had no standing in the case upon its view as to the scope of the application of the railway company for relief from the assessment, and of the pleadings, and it is not contended that such view is erroneous.

Constitutional Law—Impairing Contract Obligations—Reserved Power to Amend or Repeal Street Railway Charter.—The imposition upon street railway companies by Conn. act of July 1, 1895, of the cost of paving and repaving that part of the streets occupied by their tracks, is a valid exercise of the power reserved by the state to alter or amend the charter of a street railway company, which required such company to keep the street between its tracks and 2 feet on each side in good and sufficient repair.

In Error to the Supreme Court of Errors of the State of Connecticut to review a judgment which, on a third appeal, affirmed

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the judgment of the Superior Court of New Haven County, in that state, establishing an assessment against a street railway company for the cost of paving between its tracks and 1 foot on each side. Affirmed.

See same case below, 1st appeal, 75 Conn. 442, 53 Atl. 960; 2d appeal, 77 Conn. 219, 58 Atl. 703; 3d. appeal, 77 Conn. 667, 60 Atl. 651.

The facts are stated in the opinion.

Messrs. George D. Watrous and Talcott H. Russell, for plaintiff in error.

Messrs. Leonard M. Daggett and E. P. Arvine, for defendant in error.

MR. JUSTICE McKENNA delivered the opinion of the court:

This case involves the validity of an assessment of \$36,879. against plaintiff in error, for the cost of paving between its tracks and for 1 foot on each side thereof. Plaintiff in error operates a double track electric railway through West Chapen street in New Haven.

In pursuance of certain laws of the state the court of common council, through a contractor, caused the street to be paved with sheet asphalt. The work was begun in June, 1897, and completed in October or November of the same year. The city paid for the work, and, as provided by the statutes, assessed against plaintiff in error its proportion of the cost; to wit, \$36,879. On appeal to the superior court for New Haven county, that court reduced the assessment to \$5,823, and entered judgment against plaintiff in error for that sum.

The learned judge of the superior court expressed the contentions of the parties and his conclusions as follows:

"It is contended by the defendant that the assessment against the plaintiff is legal and valid under the act of 1895. Charter of New Haven, page 80.

"It is contended by the plaintiff that the act of 1895 is repealed by the act of 1899, Special Laws of 1899, p. 181; and if it is not repealed, the act of 1895 is unconstitutional and void.

"Inasmuch as I hold and rule that the act of 1895 is repealed by the act of 1899, it is unnecessary to pass upon the constitutionality of the former. The intention and effect of the latter act is to repeal the former. The last act covers the whole subject-matter of assessments for benefits and damages arising from paved streets, and provides expressly for the assessments of benefits and damages for pavements already constructed in West Chapel street.

"This conclusion entitles the plaintiff to relief from the assessment as laid by the amendment to the report of the bureau of compensation; and it is therefore ordered that the assessment be reduced to the sum of \$5,823, as recommended by the bureau of compensation."

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And the judgment of the superior court recited:

"The asphalt pavement in said street is not a 'direct benefit to the plaintiff or its property, but, on the other hand, is a direct damage to the plaintiff and its property, inasmuch as it largely increases the expense of repairing the roadway between the rails, and of general repairs to the track, ties, and structure of the railroad. The only benefit to the railroad is such as results from the general improvement to the locality by reason of such pavement tending to increase the population and traffic in that section of the city. Such benefit does not exceed the amount of \$5,823."

Upon the appeal of the city the judgment was reversed by the supreme court of errors. 75 Conn. 442, 53 Atl. 960. On the return of the case to the superior court that court rendered judgment dismissing the application of plaintiff in error, and confirming and establishing the assessment of \$36,879. The judgment was reversed by the supreme court of errors and the case remanded to the superior court, with directions to deduct from the assessment the cost of repair. In accordance with this direction the superior court deducted from the assessment the sum of \$3,590.85, and confirmed the assessment less such deduction. This judgment was affirmed by the supreme court of errors.

The statutes under which the street was paved and the assessment against plaintiff in error was made may be summarized as follows: Section 9 of the charter of plaintiff in error authorized the common council of the city to establish such regulations in regard to the railway as might be required for "paving . . . in and along the street," and the company was required to conform to the grades then existing or thereafter established. And it was provided that the company should "keep that portion of the streets and avenues over which their road or way shall be laid down, with a space of 2 feet on each side of the track or way, in good and sufficient repair, without expense to the city or town of New Haven, or the owners of land adjoining said track or way."

It was provided (§ 13) that the act might be altered, amended, or repealed at the pleasure of the general assembly.

The charter was amended July 9, 1864, and the company was authorized to lay down its tracks and run its cars through Chapel street, subject to the prohibitions of the 9th section of its original charter.

In 1893 a general law was passed applicable to all railways, by § 6 of which it was provided that every street railway was required to keep so much of the street or highway as is included within its tracks, and a space of 2 feet on the outer side of the outer rails, in repair, to the satisfaction of the authorities of the city, town, or borough which was bound by law to maintain such street or highway. More expensive material, however, was not to be required than that used on the other parts of the street, except, however, for a space of 1 foot on each side of each rail, unless a more expensive kind of material was required in the order permitting the original location of such railway. If the railway

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company did not make such repairs after notice, it was provided that the city might do so, and recover the expense thereof from the company. And it was provided that the act should be deemed an amendment to the charters of all existing railway companies.

On July 1, 1895, an act was passed authorizing and empowering the court of common council of the city to issue bonds for the construction of permanent pavements, and providing that all pavements laid by authority of the act should be laid upon the grade of the street, and the city was empowered to collect the cost thereof from the owners of abutting land. The act contained the following provisions as to railways:

"On all streets occupied by the track, or tracks, of any railway company or companies, said company or companies shall be assessed and shall severally pay to the city the cost of paving and repaving the full length, and 9 feet wide for each and every line of track of such railway or railways, now existing, or that may hereafter be laid in any street of said city."

By supplement to this act, passed in March, 1897, it was provided that, in estimating the cost of each square yard to be assessed, the entire cost of laying the pavement and the agreement to keep the pavement in repair for a period not exceeding fifteen years should be considered.

An act passed, April 28, 1899, provided for an assessment upon the "grand list" 1 mill on the dollar for the paving of streets, to be expended only for the original construction of pavements. There was a provision for the laying of benefits and damages, and a specification of limits of the assessment, varying with the kind of material used for paving. Assessment of benefits and damages for the pavement of certain streets and on West Chapel street were required to be laid in accordance with the provision of the act. Anyone aggrieved by the assessment was given the right of appeal to the superior court. The act was declared to be an amendment to the charter of the city, and acts inconsistent therewith were repealed. The liability of street railway companies under the general laws was preserved.

The statutes and the assessments made under them are attacked by plaintiff in error as repugnant to the contract clause of the Constitution of the United States and the 14th Amendment.

1. The contention that the assessment was unconstitutional, even though the act of 1895 is constitutional, was commented on by the supreme court of errors on the second appeal as follows:

"Other claims new to the case are made, to the general effect that as the street had been paved twenty-three years before, and the plaintiff had been assessed a portion of the cost thereof, and especially as the city had not shown the need of the new pavement as a means of repair, an unconstitutional use of the act would result if the present charge against the plaintiff was enforced. These claims have no foundation, either in the application or pleadings, and therefore have no standing in the case. We do not hesitate to say, however, without discussion, that in view

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of the pleadings, which did not put the defendant to the proof of the necessity of the new work as a means of repair and proper maintenance of the street, the facts indicated could not be held sufficient to accomplish the results claimed for them." [77 Conn. 224, 58 Atl. 705.]

Plaintiff in error contests this conclusion of the court, and insists that the claims were made on the first appeal of the case, and were overlooked by the court. It is questionable whether we may dispute the ruling of the supreme court of errors as to what the record in the case before it showed. But, granting we have such power, the record does not justify the assertion of plaintiff in error. A bill of exceptions was tendered by plaintiff in error to the superior court of certain claims and requests for rulings made by plaintiff in error, so that the questions arising thereon could be considered by the supreme court of errors in connection with those by the appeal of the city, and one of the claims was "that the repavement, if required at all, could only be required when it was found to be satisfactory, or the most satisfactory, method of repair, which did not appear in this case."

The bill of exceptions stated also that the court did not rule upon the requests, because it was of opinion that the act of 1895, so far as it affects the pavement in question, was repealed by the act of 1899, "and therefore decided against said requests." The court allowed the bill of exceptions, and expressed the reason as follows: "Being of the opinion that some, at least, of the questions arising upon the above bill of exceptions will arise again if a new trial of this cause should be had, the above bill of exceptions is hereby allowed, and ordered to be made a part of the record."

But this does not militate with the ruling of the supreme court of errors, nor indicate that the court did not consider the claims and requests of plaintiff in error. The ruling was based upon the application or pleadings, and it is not contended that the court's view of the application or pleadings was erroneous. Indeed, on the return of the case to the superior court an application was made by plaintiff in error for leave to amend its application by adding six paragraphs, setting out the grounds indicated above and other grounds why the assessment was an unconstitutional exercise of the authority in terms conferred by the act of 1895. The motion was denied on the ground (1) that the court had no power to allow the amendment, and (2) that the amendment ought not, as a matter of discretion, to be allowed. The ruling was affirmed by the supreme court of errors. Justifying its ruling, the court denied that it thereby enforced a stringent rule of pleading, but said it enforced only the familiar one which confined the evidence to the matters pleaded, and that it was the duty of plaintiff in error to have made its application full enough to cover all the claims desired to be made.

(2) It will be observed that the superior court ruled that the act of 1895 was repealed by the act of 1899, and that the latter act

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covered the whole subject-matter of assessment for benefits and damages accruing from paved streets, and provided expressly for the assessments of benefits and damages for pavements which had been constructed on West Chapel street. The supreme court of errors reversed the ruling and sustained the contention of the city that the assessment should be made under the act of 1895. The court said: "This difference of view explains the situation disclosed by the case. The city bases its claim to the larger sum assessed by it upon the rule of recovery laid down in the act of 1895; the railway company claims to limit its liability at least to the smaller sum assessed by the court, upon the strength of the rule of assessment prescribed in the act of 1899, as interpreted by the court and accepted by the company." And after the construction and discussion of the provision of the two acts the court said: "The situation is, we think, susceptible of a simple explanation. The act of 1899 is to be taken in its natural meaning. Its provisions relating to assessments were intended to deal only with assessments of benefits and damages in favor of or against owners of land whose land adjoins the street in which the pavement is laid, by reason of some benefit or damage received affecting its value. The railway companies were not meant to be and are not to be regarded as within their scope. No change in the burden already upon them for the completed work was intended to be effected." [75 Conn. 446, 450, 53 Atl. 962, 963.]

So, deciding between the statutes, the court adjudged that the act of 1895 was constitutional, on the ground that it was a proper exercise of the police power of the state, and on the ground that the act was an exertion of the power reserved by the state of altering, amending, or repealing the charter of the railway company. If either ground is tenable the judgment must be affirmed. We will place our decision on the second ground, as being of more local character, and because the exercise of the power expressed only comes under our review in its excesses.

We accept the decision of the supreme court of errors, that the statutes were intended as an exercise of the power of amendment reserved by the state, although plaintiff in error contends that such was not their intention. The court treated the question involved as primarily one on statutory construction, and "best approached," to use the language of the court, "by an examination of the statutory situation," and upon that examination pronounced its conclusion that "the act of 1895 was in effect an amendment of the plaintiff's charter," citing *Bulkley v. New York & N. H. R. Co.*, 27 Conn. 479; *New York & N. E. R. Co. v. Waterbury*, 60 Conn. 1, 22 Atl. 439. Was such an amendment in excess of the power of the state? The limitation upon the power of amendment of charters of corporations has been defined by this court several times. It is said in one case that such power may be exercised to make any alteration or

amendment in a charter granted that will not defeat or substantially impair the object of the grant or any rights which have vested under it, which the legislature may deem necessary to secure either the object of the grant or any other public right not expressly granted away by the charter. *Holyoke Water-Power Co. v. Lyman*, 15 Wall. 522, 21 L. Ed. 140. In another case it was said that the "alterations must be reasonable; they must be made in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration." *Shields v. Ohio*, 95 U. S. 324, 24 L. Ed. 359. Later cases have repeated these definitions. *Sinking Fund Cases*, 99 U. S. 720, 25 L. Ed. 502; *Greenwood v. Union Freight R. Co.*, 105 U. S. 13, 26 L. Ed. 961; *Close v. Glenwood Cemetery*, 107 U. S. 476, 27 L. Ed. 412, 2 Sup. Ct. Rep. 267. In the *Sinking Fund Cases*, it was said that whatever regulations of a corporation could have been inserted in its charter can be added by amendment. All the cases are reviewed and their principles affirmed in *Stanislaus County v. San Joaquin & K. River Canal & Irrig. Co.*, 192 U. S. 201, 48 L. Ed. 406, 24 Sup. Ct. Rep. 241. and water rates fixed by the board of supervisors of the county of Stanislaus under a law of the state sustained though the income of the company was reduced from $1\frac{1}{2}$ per cent. per month to 6 per cent. per annum.

In the light of these cases let us examine what the statutes of Connecticut require of plaintiff in error. By its original charter (1862) plaintiff in error was required to keep the street between its tracks, with a space of 2 feet on each side of the tracks, in good and sufficient repair. In the amendment of the charter in 1864 this obligation was retained, and also in the public acts of 1893. In the act of 1895 the duty of paving and repaving was imposed on all railway companies. We shall assume, for the purpose of our discussion, that the duty to repair did not include the duty to pave and repave, although much can be said and cases can be cited against the assumption. Does the change and increase of burden upon the plaintiff in error come within the limitations upon the reserved power of the state? Has it no proper relation to the objects of the grant to the company or any of the public rights of the state? Can it be said to be exercised in mere oppression and wrong? All of these questions must be answered in the negative. The company was given the right to occupy the streets. It exercised this right first with a single track, and afterwards with a double track. Before granting this right the state certainly could have, and reasonably could have, put upon the company the duty of paving as well as of repairing. Such requirement would have been consistent with the object of the grant. It is yet consistent with the object of the grant. It is not imposed in sheer oppression and wrong, and the good faith of the state cannot be questioned. It is imposed in the exercise of one of the public rights of the state,—the

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establishment, maintenance, and care of its highways. The extent of this right is illustrated by *West Chicago Street R. Co. v. Illinois*, 201 U. S. 506, 50 L. Ed. 845, 26 Sup. Ct. Rep. 518, and cases cited.

Judgment affirmed.

ST. LOUIS, E. R. & W. RY. CO. v. OLIVER *et al.*

(Supreme Court of Oklahoma, Sept. 8, 1906.)

[87 Pac. Rep. 423.]

Eminent Domain—Land Not Taken—Compensation.*—Where a railroad, in condemning a right of way, cuts in two a tract of land, the fact that the operating of trains over the line of road and across the particular land increases the danger of fire to buildings and crops, and increases the danger to stock, are not matters which constitute independent elements of damages for which a specific award may be made; but such facts, when proven, together with any other inconveniences or dangers occasioned by the building and operating of the road, may be considered by the jury in determining the value of that part of the land not taken.

Judgment—Entry—Amount of Recovery—Interest—Verdict.†—In a case tried by jury, where it is clearly apparent that the prevailing party is entitled to interest upon the amount found in the verdict, and it is unquestionably clear that the jury allowed no interest, or where the court reserved the question of allowance of interest until after verdict, and it is clearly ascertainable from the verdict or uncontroverted facts, the dates from which and to which interest should be allowed, and the rate is fixed, the court may make the computation, and add the interest so found to the sum found in the verdict and render judgment for the aggregate amount.

Eminent Domain—Appeal from Award—Trial by Jury—Procedure.—In a condemnation proceeding, where the landowner appeals from the award, and the case is tried to a jury in the district court, it is not proper to permit the jury to be informed of the amount of the award made by the commissioners, and as the allowance of interest is dependent upon the question as to whether the amount of damages awarded by the jury is greater or less than the award of the commissioners, the court may, where the question is uncontroverted as to the date from which interest should be allowed, reserve the question of interest for determination by the court and direct the jury not to include interest in their verdict.

Burwell, J., dissenting.

(Syllabus by the Court.)

*For the authorities in this series on the question whether danger to property not taken from fires set by locomotives may be an element of damages in condemnation proceedings, see foot-notes appended to *Chicago Southern Ry. Co. v. Nolin* (Ill.), 20 R. R. R. 331, 43 Am. & Eng. R. Cas., N. S., 331.

For the authorities in this series on the subject of the measure and elements of damages recoverable in condemnation proceedings, see generally foot-notes appended to *St. Louis, etc., Ry. Co. v. Mendonsa* (Mo.), 19 R. R. R. 618, 42 Am. & Eng. R. Cas., N. S., 618; *Norfolk & W. Ry. Co. v. Davis* (W. Va.), 19 R. R. R. 593, 42 Am. & Eng. R. Cas., N. S., 593.

†For the authorities in this series on the subject of the right to interest on the amount of damages recovered in negligence and eminent domain cases, see foot-note appended to *Central of Georgia Ry. Co. v. Hall* (Ga.), 19 R. R. R. 741, 42 Am. & Eng. R. Cas., 741.

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Error from District Court, Logan County; before Justice C. F. Irwin.

Action by the St. Louis, El Reno & Western Railway Company against James E. Oliver and Annie Oliver. From a judgment in condemnation proceedings, the railway company brings error. Affirmed.

Dale & Bierer, for plaintiff in error.

Cotteral & Hornor, for defendants in error.

BURFORD, C. J. The St. Louis, El Reno & Western Railway Company commenced proceedings to condemn the right of way for its line of road over the lands of the defendants in error. After the award was made by the commissioners, a trial by jury was demanded, and a trial had in the district court, which resulted in a judgment against the railroad company for \$4,573 and costs of suit. The company has appealed to this court and argue but two points in their brief.

The trial court gave the following instruction to the jury: "In determining the depreciation in value of this land by the construction and operation of a railroad across said land, if any depreciation has been caused, you have no right to include in your estimate any damages from loss by probable fires. The law requires the railroad company to pay for all losses occasioned by fires set out by it, and such losses cannot be recovered until they actually occur; nor can damages be allowed for the probable loss for killing stock or frightening teams. But if the mere fact of operating trains across the farm, with its probable attendant danger of fires, killing of stock, frightening teams, noises, etc., depreciates the salable value of the land and decreases its actual reasonable market value, then any such depreciation may be considered by you in assessing the damages to the remaining portion of said land."

It is contended by the appellant that the jury had no right to consider in any way possible fires or injury to stock, etc., as bearing upon the amount of damages. Let us consider the real effect of the instruction. The first part of it tells the jury that they cannot consider damages from loss by probable fires, etc., and in this statement the court had reference to such loss as an independent element of damages; but in the latter part of the instruction the court states that the jury may take into consideration the probable dangers of fires, and the killing of stock, the frightening of teams, noises, etc., in determining the detriment caused to the remaining portion of the land; and as to whether or not the operating of the company's trains would be attended by any probable dangers or inconveniences from these sources the jury were left to determine. But, if attended by dangers and inconveniences, and their presence affected the value of the land, the court said they might be considered in determining the defendants' (landowners') injury.

It is argued that these matters are too remote and are not

contemplated by the law, and section 1041 of Wilson's Revised and Annotated Statutes of 1903 is cited to support this position. That part of the section which is applicable is as follows: "The commissioners shall be duly sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which such owner may sustain by reason of such railroad; and they shall assess the damages which said owner will sustain by such appropriation of his land; and they shall forthwith make report thereof in writing to the clerk of the said court, setting forth the quantity, boundaries and value of the property taken, or amount of injury done to the property which they assess to the owner." In the exercise of the right of eminent domain, due regard should be observed for the enjoyment of the property of the owner which is not taken, as well as full compensation paid to him for the property of which he has been deprived; and when the Legislature directed the commissioners, by the terms of the statute last referred to, to "inspect said real property and consider the injury which such owner may sustain by reason of such railroad," and to "assess the damages which said owner will sustain by such appropriation of his land," it was intended that he should not only receive pay for the land actually taken, but that, if only a part of a tract were appropriated, the injury, if any, to his remaining land, should be considered; the real measure of damages being the difference, if any, in the value of the land as a whole, without the road over it, and the value of that which remains untaken, burdened with the dangers and inconveniences incident to the operating of the road. And if the running of trains over the company's road increases the dangers of fire to grass and grain, etc., raised on the adjoining lands, which formed a part of the original tract from which the right of way was taken, and adds to the inconvenience of farming the remaining land, such matters ought to be considered by the jury as bearing upon the amount of damages sustained—not as independent items of damages, but as affecting the market value of the land untaken. If the owner were to offer the land for sale, a prospective purchaser would consider those dangers and inconveniences. They contribute to the injury of the owner, and are the direct result of the building and operating of the road. The statute allows such owner for "the injury he may sustain by reason of such railroad, and for all damages sustained by such appropriation of his land." Mr. Lewis, in his work on Eminent Domain (volume 2, § 497), says: "When a part of a tract is taken for railroad purposes, danger from fire to buildings, fences, timber, or crops upon the remainder, in so far as it depreciates the value of the property, may be properly considered. It is immaterial that the railroad company is made absolutely liable for all losses by fire which originate from the operation of the road, whether they result from negligence or otherwise. Such liability would doubtless render the depreciation in value less than in cases

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where the company was liable only for fires resulting from negligence. It is to be borne in mind that compensation is not to be given for increased exposure to fire, nor for increased insurance rates, nor for probable losses by fire in the future, for which no recovery can be had, but simply for depreciation in the value of the property by reason of the danger from fire."

The Supreme Court of Arkansas, in the case of L. R., Miss. & Texas Railway Company v. Allen, 41 Ark. 431, laid down the following rule: "The measure of damages for the right of way taken by a railroad company across a city or town lot is the difference between the value of the whole land without the road, at the time it was built, and the value of the portion remaining after it is built; and in estimating this value the jury should consider all present and prospective actual damages resulting to the owner from the prudent construction and operation of the road, the effect the road will have in decreasing the value of the land for gardening purposes, * * * the dangers occasioned by the risk from fire, the care of family and stock, as well as inconveniences caused by embankments, excavations, ditches and obstructions to the free ingress and egress of the premises, and from the sounding of whistles, ringing of bells, and rattling of trains." To the same effect are Texas & St. L. Ry. Co. v. Cella, 42 Ark. 528; Railway v. Combs, 51 Ark. 324, 11 S. W. 418. Illinois has also upheld the rule stated in this opinion in a number of cases, among which is Chicago, Peoria & St. Louis Ry. Co. v. Michael Greiney, 137 Ill. 628, 25 N. E. 798. The trial judge, as in this case, instructed the jury that dangers to fire, stock, etc., caused by building and operating the road, might be considered in determining the damage to the land not taken. Mr. Justice Scholfield said: "Counsel argue that this is, in effect, allowing for supposed damages to stock and for supposed damages from fire, which this court has held (and properly) is not admissible. But this is not the language or the meaning of the instruction. The effect of the instruction is that the jury are to take into consideration all facts which contribute to produce damage to the land not taken, as they appear from the evidence. That the facts recited are circumstances which may tend to deteriorate the value of a farm, and therefore contribute to produce damages to land not taken, we think can admit of no controversy." Chicago, Peoria & St. Louis Ry. Co. v. Henry L. Blume, 137 Ill. 448, 27 N. E. 601; Chicago, Peoria & St. Louis Ry. Co. v. E. Nix, 137 Ill. 141, 27 N. E. 81; Chicago, Paducah & Memphis Railroad Co. v. William T. Atterbury, 156 Ill. 281, 40 N. E. 826; Chicago, Peoria & St. Louis Ry. Co. v. James Aldrich, 134 Ill. 9, 24 N. E. 763; Centralia & Chester Railroad Co. v. Maria J. Brake *et al.*, 125 Ill. 393, 17 N. E. 820; Chicago, Burlington & Northern Railroad Co. v. Alice Bowman *et al.*, 122 Ill. 595, 13 N. E. 814; Chicago & Iowa Railroad Co. v. Robert Hopkins *et al.*, 90 Ill. 316. See footnote No. 17, on page 1114 of volume 2 of Lewis on Eminent

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Domain; Cyc. vol. 15, p. 752, footnote No. 31; Nels Johnson v. Chicago, Burlington & Northern Railroad Co., 37 Minn. 519, 35 N. W. 438; Curtis v. St. Paul S. & T. F. R. Co., 20 Minn. 28 (Gil. 19); Orpheus Stillman v. Northern Pacific, Fergus & Black Hills Railroad Co., 34 Minn. 420, 26 N. W. 399; Johnson v. City of Boston, 130 Mass. 452; Chicago, Burlington & Quincy Railroad Co. v. Ezra B. Shafer, 49 Neb. 25, 68 N. W. 342; Fremont, Elkhorn & Missouri Valley Railroad Co. v. George Bates, 40 Neb. 381, 58 N. W. 959; Omaha Southern Railway Co. v. Levi G. Todd, 39 Neb. 818, 58 N. W. 289; St. Louis, Ft. Scott & Wichita Railroad Company v. Timothy McAuliff, 43 Kan. 185, 23 Pac. 102; J. T. Hamilton *et al.* v. Pittsburg, Bessemer & Lake Erie Railroad Co., 190 Pa. 51, 42 Atl. 369, 51 L. R. A. 319; Wilmington & Reading Railroad Company v. Stauffer, 60 Pa. 374, 100 Am. Dec. 574. The earlier Pennsylvania cases held the contrary rule. Pingery v. Cherokee & Dakota Railway Company, 78 Iowa, 438, 43 N. W. 285; Wooster v. Sugar River Valley Railroad Co., 57 Wis. 311, 15 N. W. 401. The instruction given is in consonance with reason, and is upheld by the weight of authority.

The second contention of the appellant is that the court had no right in law to compute interest on the amount of the award, and include such interest in the judgment. It is clear from the record that the jury did not allow any interest, for the court, over the objections of the attorney for the railroad company, instructed them not to include interest in their verdict, as the court would determine the question of appellee's right to interest. The appellant nowhere insists that interest should not be allowed, but that the jury should have computed the amount thereof and included it in the general verdict. The contention is urged that, inasmuch as we adopted the Kansas Code of Civil Procedure and the Kansas Supreme Court had announced a doctrine contrary to the ruling of the trial court in this cause, the rule comes within the frequently announced doctrine of this court that, where an adopted statute has received a settled construction by the highest courts of the state from which we borrowed the statute prior to our adoption of it, we will follow such construction. While we adhere to the above rule of construction of adopted statutes, we do not think that the question here under consideration comes within the rule. The question is not one of the construction of a statute, but one of practice, upon which the Code prescribes no mandatory rule. It is true the Code provides (section 4475, Wilson's Rev. & Ann. St. 1903): "Where by the verdict either party is entitled to recover money of the adverse party, the jury in their verdict must assess the amount of the recovery." Yet a substantial compliance with this provision is all that is required, and where the law fixes the rate of interest, and the court is able to determine that the jury has allowed no interest, and the time for which interest is to be allowed is apparent, we can see no impropriety

in the court making the computation, and including the amount in the judgment.

It is true some of the Kansas cases seem to be antagonistic to this doctrine. The first case to which our attention has been called is *Educational Association, etc., v. Hitchcock*, 4 Kan. 36, in which the jury returned a verdict for "\$480.27, and interest from the 4th day of June, 1864." The trial court included the interest in the judgment. The Supreme Court modified the judgment and struck out the interest. The court said: "It was the duty of the court to instruct the jury as to the rate of interest, and then they might calculate it. Failing to do so, and the jury failing to compute it, the court could not take such interest into consideration in rendering judgment." Yet in the case of *City of Atchison v. Byrnes* the verdict of the jury was for "\$334.00, with interest from Dec. 24, 1872, at the rate of seven per cent. per annum." The court computed the interest, and included it in the judgment, and the Supreme Court affirmed the judgment. And in the case of *Wilson v. Means*, 25 Kan. 83, the Supreme Court of that state said: "Exception is also taken to the judgment on the ground that it is for a much larger amount than authorized by the verdict. The point is well taken. The jury failed to compute the interest, or to specify any rate of interest in the verdict. Therefore the court could not take the interest into consideration in rendering judgment. The case comes clearly within the rule announced in *Educational Association v. Hitchcock*, 4 Kan. 36. Where the interest is not stated in the verdict, the court cannot tell with certainty the rate intended by the jury, and in such cases it would be necessary, in order to determine the interest, to look back to the petition or some other pleading. Such a procedure is not allowable. If the interest is computed and included by the jury in the verdict, or if the rate of interest is specified, and the date from which and to which the damages are to draw interest, the amount assessed by the jury may be calculated with absolute certainty from the face of the verdict, and the court may include the interest in the judgment." In this case is found a clear recognition of the right of the court to include interest in the judgment, where the same is but a matter of computation, although the amount is not stated in the verdict. Again, in the case of *Mills v. Mills*, 39 Kan. 455, 18 Pac. 521, it was held: "In assessing the value or amount of recovery the jury should include in their verdict any interest found to be due; but, where the rate of interest and the dates between which it is to be recovered are stated in the verdict, the court can determine the amount of the interest with absolute certainty, and may properly include the same in the judgment entered in the verdict." Here, also, is a recognition of the authority of the court to render a judgment for a greater amount than that fixed in the verdict, where the computation can be made from data appearing upon the face of the verdict. We can perceive no substantial difference between the power

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exercised by the court in the Kansas case and the one at bar. The only difference is in the means employed to reach the result. One is as certain and definite as the other. In *Southern Kansas Railway Company et al. v. Showalter*, 57 Kan. 681, 47 Pac. 831, the court said: "It is error for the court to compute interest on the amount of a verdict for a period prior to the date of its rendition, and render judgment therefor, when the verdict neither includes such interest nor affords definite data for its computation."

The last expression of the Kansas Supreme Court to which our attention has been directed upon a similar question was in *Marsh v. Kendall et al.*, 65 Kan. 48, 68 Pac. 1070. In this case the jury rendered a verdict for the balance due upon a promissory note, and omitted to include or make any mention of interest. The court computed and added to the amount found in the verdict over \$100 of interest, and rendered judgment for same. In this case the plaintiff objected, and appealed from the judgment. The Supreme Court said: "In this case the jury had found against the defendant as to the facts and times and amounts of payments made. The meritorious issues of the case had been thereby settled as fairly as though interest had not been mistakenly omitted from the calculation. There could not be any dispute as to the rate of interest, or the time it ran since the last payment was made. Hence, had the motion for new trial been sustained, it would have been to correct a mere mathematical error, which the court and parties themselves were entirely able to rectify. It would have been to retry a disputed question of fact, not for any error in determining such fact, but for an error as to another matter about which there was no dispute. In such cases as this the courts are authorized to make an addition to the verdict, or, rather, to render judgment for the additional amount." No language could be more apt or applicable to the case under consideration. If a new trial is granted, it will be to correct a mere mathematical calculation, about which, as appears from the record in this case, there was and can be no dispute. The issuable fact was what sum the landowner was entitled to receive for the land taken for right of way and injuries to the remainder of the land upon the date of the award by the commissioners, and the court so informed the jury, and they determined and fixed that sum. The landowner having, as appeared from the record, obtained a larger verdict than the amount of the award, he was entitled to interest at the legal rate upon the amount of the verdict from the date of the award until the date of the judgment. The data from which to make the calculation or computation were all a matter of record and undisputed. The court, out of commendable precaution, refrained from informing the jury of the amount of the award, and instructed them that they should not consider the question of interest, and, if it should appear after verdict that the landowner was entitled to interest, the court would compute it and

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include it in the judgment; and this action of the court is abundantly sustained by authority.

In *Reed v. Chicago, M. & St. P. Ry. Co.* (C. C.) 25 Fed. 886, the jury was instructed to return a verdict assessing the damages in a condemnation suit as of the date of the condemnation proceedings, and the question was presented as to whether the court could compute the interest and include such sum in the judgment. Mr. Justice Shiras, the presiding judge, said: "Until the verdict is rendered it cannot be known whether plaintiff may be entitled to interest. When this is determined by the amount of the verdict, the court can then make the proper order, and the same will form part of the adjudication settling damages." And the court determined the amount of interest the plaintiff was entitled to, added this sum to the amount of the verdict as returned by the jury, and rendered judgment for the aggregate amount. The case of *Alloway v. Nashville*, 88 Tenn. 510, 13 S. W. 123, 8 L. R. A. 123, was a condemnation proceeding. The jury allowed no interest. No instruction on that subject was given or requested; but after the verdict was returned, and before judgment was entered, Alloway moved the court to add interest. This the court refused to do, and Alloway appealed, assigning as error the refusal of the court to include interest in the judgment. The Supreme Court said: "Refusal to add interest was error. In the language of one of the counsel for appellants, 'if the party in whose favor there is a verdict is, as a matter of law, entitled to something additional, the court may allow it.' Inasmuch as the error can be readily corrected here, that will be done, instead of reversing and remanding. This court will render the judgment that should have been rendered below." In *Elliott on Railroads*, vol. 3, p. 1457, that eminent author says: "Where the jury were instructed that interest from the time the property was taken constituted a part of the plaintiff's damages, it will be presumed that interest to the date of the verdict is included therein, and judgment should be rendered simply for the amount of the verdict; but it is proper to have assessment on appeal made as of the date of the original award, and the court should in such case add interest to the amount of the verdict in rendering judgment." The Supreme Court of Minnesota in *Warren v. St. Paul & Pacific Railroad Co.*, 21 Minn. 424, and in *Whitacre v. St. Paul & Sioux City R. R. Co.*, 24 Minn. 311, expressly approves the practice, and declares it to be the duty of the court, in cases where the verdict of the jury assesses the damages as of a date of the condemnation proceedings and prior to the trial, to calculate the interest from the date at which the damages are assessed to the time of trial, and render judgment for the amount of the verdict, with the interest added.

The foregoing authorities seem to support a rule founded in reason and justice, and one which can result in no injury to any one. Where it is clearly apparent from the verdict, or the

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verdict and instructions of the court, that the jury did not, in the assessment of the amount of the recovery, include interest, and it is further clearly apparent that the party recovering is entitled to interest in addition to the amount stated in the verdict, and the rate is fixed by law or made certain by the terms of the contract, and the date from which and to which interest should be computed is clearly and unquestionably ascertainable from the face of the verdict or from uncontroverted facts of record, the court may lawfully compute or calculate the interest, and add such sum to the amount allowed by the jury, and render judgment for the aggregate sum. In the case at bar the trial court instructed the jury that their inquiry should be confined to the damages sustained by the landowners on the 21st day of August, 1903, and the jury assessed the damages as of that date. The court also instructed the jury that they should not include any interest in their verdict, but that the question of allowance or disallowance and amount of interest would be reserved for determination and action by the court. The verdict was returned on December 10, 1904, and fixed the amount of damages at \$4,160 on the 21st day of August, 1903, the date of the condemnation proceedings. It was admitted that the railway company had been in possession since that date, and had constructed its railroad. The law fixes the rate of interest in such cases. The sum allowed by the jury was in excess of the amount awarded by the condemnation commissioners. This entitled the Olivers, as a matter of law, to interest at the rate of 7 per cent. per annum, the amount found in the verdict, from the 21st day of August, 1904, to the date of the rendition of judgment. This was all clearly apparent and ascertainable from the uncontroverted facts in the record. It was but a matter of mathematical computation to determine the amount of interest, and this court could as well do as the jury; and we deem this the better practice in this class of cases. The allowance of interest is a contingency dependent upon whether the verdict of the jury is larger or smaller in amount than the award of the commissioners, and the jury should not be permitted to know what the award was.

We find no error in the record, and the judgment is affirmed, at the costs of the plaintiff in error. All the Justices concur, except IRWIN, J., who tried the case below, not sitting, and BURWELL, J., who dissents as to the allowance of interest by the court.

BALTIMORE & O. R. CO. *v.* WHITEHILL.

(Court of Appeals of Maryland, Nov. 2, 1906.)

[64 Atl. Rep. 1033.]

Carriers—Live Stock—Delay in Transportation.*—In the absence of an express contract, it is the duty of a carrier to transport and deliver cattle received by it within a reasonable time thereafter, and it is liable for negligence in so doing.

Same—Duty to Furnish Cars.†—It is the duty of a railroad company engaged in the business of transporting freight as a common carrier to receive cattle for transportation upon reasonable notice of the time and place where such tender will be made, and it is liable for failure to provide means of transportation after such notice.

Pleading—Striking Out Count—Effect.—In an action against a carrier for negligence in receiving and transporting cattle, the declaration contained five counts. Immediately following the fifth count it stated, "Whereby, on each of several occasions, by reason of the premises, said cattle failed to reach the Union Stockyards in time for the market on the respective days of delivery"—thus distinctly connecting the loss sustained and the damages claimed with the negligence alleged in each of the counts in the declaration. Held, that an order striking out the fifth count did not have the effect of striking out the statements following it.

Carriers—Live Stock—Actions—Evidence.—In an action against a carrier for delay in transporting and delivering cattle, it is not essential that plaintiff prove the delay to have resulted from some independent specific act of negligence.

Same.—In an action against a carrier for delay in transporting and delivering cattle in time for a certain market, knowledge of defendant that the cattle were intended for delivery and sale at the market on a particular day may be shown from circumstances in the case, and need not be proved by direct and positive evidence of the communication of that fact to defendant.

Same—Damages—Measure.‡—In an action against a carrier for delay in transporting and delivering cattle in time for a certain market, evidence was admissible to show the difference in the market value of the cattle at the time the market was held and at the time of their delivery after the market.

Same—Evidence.—In an action against a carrier for delay in trans-

*For the authorities in this series on the question, what delays will render carriers of freight liable, see foot-notes appended to *Mauldin v. Seaboard Air Line Ry.* (S. Car.), 19 R. R. R. 76, 42 Am. & Eng. R. Cas., N. S., 76; *Alabama Great So. R. Co. v. Quarles & Couturie* (Ala.), 19 R. R. R. 69, 42 Am. & Eng. R. Cas., N. S., 69; foot-notes appended to *General Fire Ext. Co. v. Carolina & N. W. Ry. Co.* (N. Car.), 19 R. R. R. 336, 42 Am. & Eng. R. Cas., N. S., 336.

†For the authorities in this series on the subject of the duty of common carriers to receive and transport freight, see foot-note appended to *State v. Atlantic Coast Line R. Co.* (Fla.), 20 R. R. R. 710, 43 Am. & Eng. R. Cas., N. S., 710.

For the authorities in this series on the duty of carriers to furnish cars for the transportation of freight, see foot-notes appended to *Agee & Co. v. Louisville & N. R. Co.* (Ala.), 18 R. R. R. 129, 41 Am. & Eng. R. Cas., N. S., 129; *Central of Georgia Ry. Co. v. Augusta Brok. Co.* (Ga.), 16 R. R. R. 634, 39 Am. & Eng. R. Cas., N. S., 634; *State v. Chicago, etc., R. Co.* (Neb.), 14 R. R. R. 402, 37 Am. & Eng. R. Cas., N. S., 402.

‡For the authorities in this series on the subject of the right to recover special damages for loss or injuries from delay in transport-

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porting and delivering cattle in time for a certain market, after plaintiff had testified as to the price received for the delayed cattle, it was proper for his attorney to ask him whether the prices received were the best prices.

Trial—Reception of Evidence—Striking Out—Answers in Part Responsive.—Where part of an answer by a witness is responsive and proper evidence, it is proper for the court to refuse to strike it out where objection goes to the whole answer.

Carriers—Live Stock—Duty to Furnish Cars—Negligence.—In an action against a carrier for failure to furnish a car for the transportation of live stock, defendant's negligence was sufficiently shown, where it appeared that it diverted the car originally sent to plaintiff and afterwards forgot to replace it.

Same—Evidence.—In an action against a carrier of live stock for delay in transporting and delivering cattle, evidence held sufficient to show that defendant accepted the cattle to be transported to the market of a particular day.

Same—Instructions.—In an action against a carrier of live stock charging negligence in different counts for delay in transportation and delivery and for negligent breach of duty to furnish cars on due notice, it was proper to refuse a requested instruction that the only duty defendant owed plaintiff in the case was to carry the cattle with reasonable diligence and avoid unnecessary delay in their delivery.

Same.—In an action against a carrier of live stock for failure to transport and deliver cattle in time for the regular market of a certain day, it was proper to refuse an instruction that there was no evidence sufficient to show that the cattle were not sold in "open market" on that day; there being no question of "open market" in the case.

Same.—In an action against a carrier of live stock for failure to transport and deliver cattle in time for the market of a certain morning, a prayer for an instruction denying plaintiff's right to recover if the cattle were delivered at a certain station before the opening of the market on that morning was properly refused, where the evidence showed that delivery at the stockyards was not made until the cattle were placed at the pens, and that they had to be so placed by a switch engine, and that such delivery was not made until after market hours.

Trial—Instructions—Requests—Instructions Already Given.—There is no error in denying a prayer for an instruction, the subject-matter of which is contained in other instructions which are given.

Carriers—Live Stock—Instructions—Damages.—In an action against a carrier of live stock for failure to promptly receive and transport cattle, defendant's prayer limiting plaintiff's recovery to nominal damages was properly denied, where there was proof of actual loss by reason of the detention of the cattle.

Appeal—Waiver of Error.—Where no reference is made either in appellant's brief or in the oral argument to a ruling of the lower court denying a prayer for an instruction, it will be presumed that appellant accepted the ruling as correct.

Carriers—Live Stock—Special Contracts—Evidence.§—Where a carrier of live stock seeks to avoid liability for delay in transporting and delivering cattle under a claim that plaintiff shipped the stock under a contract by which a lower rate was charged, in considera-

ing freight, see foot-notes appended to *Illinois Cent. R. Co. v. Johnson & Fleming* (Tenn.), 20 R. R. 727, 43 Am. & Eng. R. Cas., N. S., 727; foot-notes appended to *Carpenter v. Baltimore & O. R. Co.* (Del. Sup'r Ct.), 20 R. R. 679, 43 Am. & Eng. R. Cas., N. S., 679; foot-notes appended to *Southern Ry. Co. v. Webb* (Ala.), 20 R. R. 26, 43 Am. & Eng. R. Cas., N. S., 26.

§See foot-notes appended to *Powers Mercantile Co. v. Wells-Fargo & Co.* (Minn.), 12 R. R. 504, 35 Am. & Eng. R. Cas., N. S., 504.

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tion of which defendant was exonerated from damages for negligent delay beyond the actual expense incurred, defendant had the burden of proof to show that plaintiff knew at the time of the shipment the rates charged and the conditions under which the rate was made, and that he agreed to ship at said rate.

Appeal from Circuit Court, Carroll County; William H. Thomas, Judge.

Action by John Whitehill against the Baltimore & Ohio Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before McSHERRY, C. J., and BRISCOE, BOYD, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

F. Neal Parke and James A. C. Bond, for appellant.

D. Princeton Buckey and J. Guy W. Steele, for appellee.

PEARCE, J. The appellee, John Whitehill, sued the appellant, the Baltimore & Ohio Railroad, a common carrier, to recover damages alleged to have been sustained by the plaintiff by reason of defendant's delay in the transportation and delivery of certain cattle of the plaintiff shipped over defendant's road to the Union Stockyards in Baltimore, to be sold at the cattle market held there.

The declaration contained five counts, of which the first alleged that on December 7, 1903, about 10 o'clock a. m. plaintiff delivered to defendant 26 head of cattle at Barnesville, in Montgomery county, to be by it carried for hire, with reasonable dispatch, from Barnesville to the Union Stockyards in Baltimore City, and there to be delivered to the plaintiff; that a reasonable time for carrying said cattle from Barnesville to the Union Stockyards was about five hours, but that the defendant negligently and carelessly detained said cattle on its road for an unreasonable length of time, to wit, from the hour of delivery before stated to the hour of 10 o'clock a. m. on the following day, when they were delivered to the plaintiff. These cattle were shipped in car No. 11751. The second count alleged, in precisely similar language, the delivery at Barnesville by the plaintiff to the defendant on December 7, 1903, at 10 o'clock a. m. of 24 other cattle to be carried to said Union Stockyards, and their negligent detention upon defendant's road until noon on the following day, when they were delivered to the plaintiff. These cattle were shipped in car No. 11822. The third count related to the same cattle mentioned in the second count. It alleged that these cattle were tendered for transportation, for hire, from Barnesville to the Union Stockyards at 10 o'clock a. m. on December 7, 1903, that being a reasonable hour for that purpose, after giving notice to defendant's agent on December 4, 1903, that said cattle would be so tendered, in order that defendant should have reasonable time to provide the means of transportation, but that defendant negligently failed and re-

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refused to receive and carry said cattle from 10 o'clock a. m. on December 7, 1903, until 11 o'clock p. m. on the same day, and did not deliver them to the plaintiff at the Union Stockyards until noon on December 8, 1903. The fourth count is the same as the first, except that it relates to a shipment of 24 other cattle from Boyds Station, in Montgomery county, to said Union Stockyards; these cattle being shipped in car No. 11960. The fifth count, also, is the same as the first, except that it relates to a shipment of still other 24 cattle from Germantown Station, in Montgomery county, to said Union Stockyards at 10 o'clock a. m. December 14, 1903; these cattle being shipped in car No. 9189, and not being delivered to the plaintiff until noon of the day following. The declaration then concluded as follows: "Whereby, on each of said several occasions by reason of the premises, said cattle failed to reach the said Union Stockyards in time for the market on the respective days of delivery. A large shrinkage took place in the weight of said cattle. A deterioration in their condition and value. The plaintiff lost the profit he would otherwise have made by a sale of said cattle at the markets held at the Union Stockyards on each of said respective days of delivery of said cattle, and the benefit of the expense incurred by him in traveling thereto, and preparing for a sale of said cattle thereat, and also lost the advantage of the expense of feeding and caring for said cattle, and other losses were then and there occasioned to the plaintiff in consequence thereof. And the plaintiff claims therefore \$1,000 damages." The fifth count was stricken out during the course of the trial, it appearing in the evidence that the cattle mentioned therein had been shipped under what is known as the "Uniform Stock Contract," under which a lower rate of freight is charged, in consideration of which the carrier is exonerated from damages for negligent delay, beyond the actual expense incurred in feeding and watering the cattle during the detention, and it also appearing that plaintiff had sold these cattle to arrive at the stockyards. The defendant demurred to each and every count of the declaration, and, its demurrer being overruled, it filed the general issue plea, upon which the case went to trial, resulting in a verdict and judgment for plaintiff for \$375, from which this appeal was taken.

During the course of the trial 19 exceptions were taken by defendant to the admission of testimony. The plaintiff offered 9 prayers, and the defendant offered 38. The plaintiff's fourth, fifth, and ninth prayers were modified by the court, and granted as modified, and all his other prayers were rejected. The defendant's thirty-first and thirty-third prayers were modified by the court, and granted as modified, and its thirty-fifth prayer was modified by the court, and as modified was granted in connection with plaintiff's fourth and fifth granted prayers, and all the other prayers of defendant were rejected. The defendant's twentieth exception was taken to the rulings on the prayers,

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but the exception to the rejection of defendant's second, third, fourth, seventh, ninth, eleventh, fourteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-fourth, thirty-second, thirty-fourth, and thirty-sixth prayers were afterwards abandoned, and these are not embraced in the record.

The first question presented is raised by the demurrer to the declaration. The first, second, and fourth counts allege that it was the duty of the defendant to transport and deliver the cattle received by it within a reasonable time thereafter, and they charge a negligent breach of this duty. These counts are founded upon the common-law duty and liability of the defendant as a common carrier of live stock, and not upon any special contract between the parties. What this duty and liability is has been declared in this state, in *P., W. & B. R. R. v. Lehman*, 56 Md. 209, 40 Am. Rep. 415, in which the court said: "In the absence of an express contract, the common-law duty and liability of a common carrier for the safe carriage and due delivery of live animals are the same as that for the carriage and delivery of other property; the liability in all cases being qualified by the nature and inherent tendencies of the thing carried. In undertaking the carriage of live stock, therefore, the carrier assumes the obligation to deliver safely and within a reasonable time, having due respect to the circumstances of the case." In view of this language, it cannot, therefore, be questioned that these counts, in respect to the allegation of duty and breach, each state a good cause of action. The third count alleges that it was the duty of the defendant to receive for transportation the cattle mentioned therein, and tendered it for that purpose, upon reasonable notice of the time and place where such tender would be made, and it charges a negligent failure and refusal to provide means of transportation and to receive said cattle after such reasonable notice had been given, to wit, three days previously. In 6 Cyc. 372, it is said: "A railroad company engaged in the business of transporting freight as a common carrier is bound to furnish suitable cars as required by customers, upon reasonable notice (and in the order of application made), whenever it can do so without jeopardizing its other business." The cases sustaining this statement of the law are numerous, and the principle is recognized in *Lehman's Case*, supra, in which the court, speaking of the duty to receive and forward cattle from a connecting railroad, said: "If the defendant provided reasonable equipment to meet the requirement of the Sunday's transportation, in the usual course, upon the notice received, and the plaintiff's cattle were carried forward and delivered with due diligence and as much expedition as was practical under the circumstances of the case, the defendant is not liable for the consequences of the unavoidable delay. But, on the other hand, if the delay could have been avoided by the use of due diligence, and the making of proper effort to send forward the cattle with

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ready and convenient dispatch, and injury resulted from a failure in that respect, the defendant is liable therefor."

It has been stated that the fifth count was stricken out, and it was further contended by the appellant that the clause in the declaration which has been herein transcribed in full, and in which is set out the several items of loss sustained and the amount of damages claimed, was a part of the fifth count stricken out, and that this invalidated the whole declaration. In 13 Cyc. 195 the law is thus stated: "It is unnecessary to insert a claim for damages at the end of each count or paragraph of the complaint. It is sufficient to state the amount demanded at the conclusion thereof." In this case, not only was this sensible rule complied with, but it is clear that the clause in question cannot, either logically or grammatically, be regarded as constituting a part of the count stricken out, for it expressly says, "Whereby, on each of several occasions, by reason of the premises, said cattle failed to reach the Union Stockyards in time for the market on the respective days of delivery"; thus distinctly connecting the loss sustained and the damages claimed with the negligence alleged in each of the counts in the declaration. It follows, therefore, that the demurrer was properly overruled.

The numerous exceptions to the admission of testimony were little discussed by the appellant, either in the brief or in the oral argument, both of which were mainly directed to the ruling upon the prayers. Many of these exceptions, however, in fact involve the same principles applicable to the prayers, and for their consideration it will be necessary to set forth briefly the substance of the testimony which was admitted. The plaintiff testified that he had been shipping cattle for sale for 35 years, and for the last 8 years over the Baltimore & Ohio Railroad from Boyds and Barnesville to the Union Stockyards, at Clairmount, near Baltimore; that these two stations are, respectively, about 65 and 70 miles from the Union Stockyards, which are the only stockyards in Baltimore, and that Germantown is about 6 miles nearer than Boyds; that there is only one market day in each week at these yards, as fixed by the president of the yards, and in December, 1903, Tuesday was the market day; that the rule of shippers of stock from those stations, and his own invariable custom, was to order his cars to be ready for loading the morning of the day before market day and to load on the day before the market day; that Mr. Wilson, the live stock agent for the Baltimore & Ohio Railroad, told him to load his stock for the market at the Union Stockyards for the way freight train; that this way freight usually came to Barnesville about 11 o'clock a. m., sometimes 12 or 1 o'clock; that the time required for transporting cattle by that train varied at times, but the ordinary time was about six hours without any trouble, unless there was some delay or something in the way, and that he had made the trip on that train in six

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hours; that he ordered two cars from the agent at Barnesville, Mr. Darby, on December 4, 1903, in time to load on Monday, the 7th, for the way freight, and they were sent, but on Monday one of these cars were gone, and Mr. Darby told him that D. O. had telegraphed him to let Mr. Titus have one of these cars, and another would be sent him in time; that he loaded the remaining car that morning and left for Hagerstown at 5:12 that afternoon, when the other car had not arrived; that on reaching Baltimore he went to see Mr. Galloway, the freight agent, or superintendent, who told him he forgot all about the other car; that one car from Barnesville and one from Boyds arrived at the stockyards between 9 and 10 a. m. December 8th; that the other car from Barnesville did not arrive at the stockyards until afternoon on December 8th; that the market always was held early in the morning, and the weighing commenced that morning about 6 o'clock, and the market was over about 8 o'clock, and never lasted longer than 10 or 11 o'clock; that he tried to get the buyers to come down from the hill where they sell to the butchers to the pens where his cattle were, to buy them, but that he could only induce one man, Mr. Fox, to look at them, and that he sold them to him at private sale for $4\frac{1}{4}$ cents, though such cattle sold readily at the market that day for $4\frac{1}{2}$ and $4\frac{3}{4}$ cents, but that $4\frac{1}{4}$ was the best price he could get, as the buyers were gone when his cattle were delivered, and there was no market for them. He said that, when he shipped stock from Germantown, he had always signed a contract similar to the uniform live stock contract shown him, but never read one, and never signed any contract for shipments from Boyds or Barnesville; and that in ordering cars and shipping stock he always told the agent where the stock was to go for sale. W. B. White testified that he had loaded stock at Barnesville for plaintiff for four or five years, and that they always loaded for the market at the Union Stockyards. the day before the market day, and that on December 7th they were one car short on their order, as one of theirs had been diverted for Mr. Titus; that he kept on trying until he got the car replaced, and it was loaded between 12 and 1 o'clock at night December 7th. Lambert, conductor of the Metropolitan Branch Baltimore & Ohio Railroad, testified, for defendant, that on December 7th he took the two cars, Nos. 11751 and 11960. from Barnesville to Washington, 30 miles, reaching there at 10:50 p. m.; that his run is from Washington to the junction and return, leaving Washington at 5:30 a. m. and due on return at 3:10 p. m.; that, if the work is light, they can make the schedule, but cannot if it is heavy, and it was then very heavy; that this is not unusual and it is always heavy at that season; that the schedule is fixed for the usual time it takes to make the trip; and that on that day he kept the train moving whenever he had a chance to get out of the way of the passenger trains. Ross, conductor of way freight from Washington to

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Clairmount, testified that on December 8th he moved these two cars from Washington to Clairmount, leaving at 1:33 a. m. and reaching Clairmount between 6 and 7 a. m., a distance of 38 miles, but did not place them at the pens for delivery of stock; that there is no schedule for way freight trains on that branch. It moves whenever it can, and never stands still unless it is impossible to move. Loch, another conductor, on the Metropolitan Branch, testified that he took car No. 11882 from Barnesville at 12:18 December 8th and delivered it at Washington at 8:20 a. m.; that the run of 30 miles that night took about eight hours, being delayed in doing extra work by defendant's orders. Hudson, another conductor, testified that he moved car No. 11882 from Washington to Clairmount, leaving Washington at 8:20 a. m. and delivering the car at Clairmount at 12:50 p. m.; could not leave earlier on account of first-class passenger trains, and moved as quickly as possible. Santman, station agent at Germantown, said the schedule of the way freight at that point was 1:15 p. m., but in December, 1903, it was usually from one to three hours late and always is at that season on account of Christmas goods. He also said plaintiff always signed uniform live stock contract at that station, but he could not say he understood it. Higgins, station agent at Boyds, said plaintiff loaded cattle on a car there on December 7th about 1 p. m., and the way freight moved it at 5 p. m. same day. He thought plaintiff, when shipping there, signed uniform contract, but could not say, as he had no records. Jameson, acting agent at Barnesville in 1903, said plaintiff usually shipped one car a week there from May to December, and usually signed a contract similar to the uniform contract shown him, and the rate charged him was nine cents. Plaintiff did not say anything in regard to shipping for market, but the cattle were usually shipped to Clairmount, which is the station, and witness knew cattle were sold there. C. W. Galloway, an employee of defendant for 23 years, and superintendent of Baltimore Division, said there was no schedule for the way freight on that division; that local freights are supposed to get out of the way of all other trains, whether they make their runs in 2 or 22 hours; and that he considered 12 hours good time for local shipment of stock from Barnesville to Clairmount. Charles W. Pledge, agent at Clairmount, said that station was commonly called Union Stockyards; that on December 8, 1903, two cars were brought in for plaintiff and were placed at the pens at 9:30 a. m., and that they were not placed sooner on account of the congested condition of the yard. Later on he said these cars were placed at 10:30, and that the third car of plaintiff came in at 12:50, and that 16 cars of cattle came in that day from the Valley of Virginia, of which 4 were for the North, and the other 12 were sold on the market at 10:30, but he did not know how much less there was on the Virginia cattle. A copy of the uniform live stock contract referred to in the evidence was offered and is set out in the record.

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We have carefully read and considered the brief of the appellant, and examined the cases referred to by him as sustaining the propositions of law upon which he relies, which may be thus stated: (1) That, to establish negligence, mere delay is not sufficient, but the delay must be proved to have resulted from some independent specific act of negligence; (2) that knowledge by defendant that the cattle in question were intended for delivery and sale on the Tuesday morning market at the Union Stockyards could only be shown by direct and positive evidence of the communication of that fact to defendant, and could not be inferred from the facts and circumstances in the case. Upon these two propositions the appellant founds its whole argument upon the exceptions to the testimony and to the ruling upon the prayers, but we are of opinion that the law in Maryland has been otherwise settled, upon both propositions in *Lehman's Case*, *supra*, and under the first proposition, not only with respect to the alleged unreasonable delay in carrying the two car loads for which cars were furnished according to notice, but also with respect to the cattle delayed by the failure to furnish the car according to notice. In *Lehman's Case*, *supra* (page 233 of 56 Md. [40 Am. Rep. 415]), the court said: "If the plaintiff's cattle were carried forward and delivered with due diligence and as much expedition as was practicable, under the circumstances of the case, the defendant is not liable for the consequences of the unavoidable delay; that is to say, a delay that could not have been avoided by the exercise of reasonable precaution and diligence. But, on the other hand, if the delay could have been avoided by the use of due diligence, and the making of proper effort to send forward the cattle with ready and convenient dispatch, and injury resulted from a failure in that respect, the defendant is liable therefor. The duty to deliver safely and the duty to deliver in due time are distinct obligations. The time of delivery is often a matter of express contract; but when, as in this case, there is no express contract, there is an implied obligation to deliver within a reasonable time, and that means the time within which the carrier can deliver, using all reasonable exertion, and taking all reasonable precaution to avoid delay. That proposition would appear to be well settled upon undoubted authority. *Parsons v. Hardy*, 14 Wend. (N. Y.) 215, 28 Am. Dec. 521; *Taylor v. Railroad Co.*, L. R. 1 C. P. 385; *Story on Bailments*, 545a; 1 *Parsons on Contracts*, 659, and cases there cited." This is applicable especially to the two car loads for which cars were furnished according to notice and request. Upon page 232 of the same case (56 Md. [40 Am. Rep. 415]) in which the cattle there in question were received by the defendant from a connecting road, the court said: "The principal question here is whether, according to the ordinary extent and usual course of the cattle trade on Sunday over the defendant's road from Baltimore, and the notice given the defendant's agents of the approach of

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trains for transportation on Sunday, the 28th of July, the defendant had made reasonable provision, and exerted due care and diligence, to guard against delay in forwarding the cattle trains that might be received from the Baltimore & Ohio Railroad on that day, or whether upon receipt of such notice as was given the requisite means or equipment could have been provided, by reasonable exertion, to take forward the plaintiff's cattle without the delay that actually occurred? And this is a question that should have been submitted to the jury for their determination upon all the proof in the cause." This is specially applicable to the cattle for which the car was not furnished according to notice and request; again, as to the proof of knowledge that the cattle here in question were intended for delivery at the early Tuesday morning market at the Union Stockyards. The court in the same case last cited, on page 234 (4 Am. Rep. 415), said: "As it is sought to charge the defendant with the consequences of the delay and the failure to use such degree of diligence as would have secured their arrival at Jersey City in time for the cattle market of Monday, the 29th of July, it is material and necessary that it should be shown that the defendant had knowledge, or from the circumstances of the case, and the course of the trade, it might have been reasonably inferred, that the cattle were intended for the market of that day."

Applying these principles, we think there can be little difficulty in disposing of the exceptions in this case. But, before proceeding to their consideration, we may remark that we find the doctrine of *Lehman's Case* to be in accord with the weight of opinion elsewhere, and that we cannot regard the cases cited by the appellant as sustaining his position. In *Thayer v. Burchard*, 99 Mass. 521, what was decided was that for losses and expenses arising from mere delay, occasioned by a temporary and unforeseen excess of business, and without fault, the carrier is not liable. In *Wibert v. N. Y. & Erie R. R.*, 12 N. Y. 245, the court said: "Where the complaint is only of late delivery, the question is simply one of reasonable diligence, and accident or misfortune will excuse the carrier, unless he has contracted to deliver within a limited time." In *Briddon v. G. N. R. W.*, 28 L. J. R. Exch. 51, it was held that a carrier of goods or cattle is only bound to carry in a reasonable time under ordinary circumstances, and is not bound to extraordinary efforts to surmount obstructions caused by the act of God. And in *Empire Trans. Co. v. Wallace*, 68 Pa. 302, 8 Am. Rep. 178, almost the same language was employed. In *Taylor v. G. N. R. W.*, L. R. 1 C. P. 385, the carrier was held excused by reason of an unavoidable obstruction, viz., an accident resulting solely from the negligence of another company running over its line. In so far as the citation from 5 Current Law may be held to sustain the appellant's contention, we cannot adopt or follow it. It is obvious that the cases to which we have adverted do not,

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and were not designed to, conflict with the principles announced in Lehman's Case, and the authorities are abundant that the carrier is not relieved from liability by pressure of freight or other business unless it is extraordinary and unforeseen. Thus in *Helliwell v. G. T. R. W.* (C. C.) 7 Fed. 76, it was held that where delay is caused solely by an extraordinary and unforeseen pressure of freight, and not by any negligence, the carrier will be excused, but otherwise if it could have been foreseen. And so in *Faulkner v. So. Pac. R. R.*, 51 Mo. 311, it was said: "Where, by reason of unusual pressure of business, a railroad cannot deliver with dispatch, it may decline to receive freight without incurring liability; but, where it is received and shipped, the carrier must forward without delay, or answer for damages caused thereby." See, also, the discussion under this head in 6 Cyc. 444, 445, where the general doctrine is stated that as to any cause of delay which he might anticipate he should then advise the shipper, and if he does not do so the delay will not be excused.

Taking up the exceptions first, it will be seen that the first, second, third, fourth, fifth, sixth, fourteenth, fifteenth, and nineteenth all relate to the proof of facts and circumstances tending to show that the defendant knew, or might reasonably have inferred, that the cattle were intended for sale at the market held at Union Stockyards on Wednesday, December 8, 1903, and there was consequently no error in admitting such testimony. The seventh and tenth exceptions were taken to the admission of evidence to show the ordinary time taken by the railroad to transport cattle from Boyds and Barnesville to Union Stockyards. The carrier being bound to deliver in reasonable time, there could be no better standard for determining what was reasonable time than comparison of the ordinary time taken with that actually taken on that occasion. The jury had before it the testimony of both parties upon that question in connection with all the circumstances existing at the time, and from this drew their conclusions. No reasons need be adduced to sustain these rulings. The eighth, ninth, sixteenth, and eighteenth exceptions were taken to the admission of evidence to show that the defendant had reasonable and ample notice of demand for the car to be supplied at Barnesville on December 7th at 10 a. m., but which was not supplied until 11 p. m. of that day, and in consequence was not delivered until noon the following day at the stockyards, and it follows from what we have said in overruling the demurrer to the third count of the declaration that this evidence was properly admitted. The eleventh, twelfth, and seventeenth exceptions are in reference to the loss sustained by the plaintiff, and the evidence was offered to show the difference in the market value of these cattle at the time the market of that morning was held and at the time of their delivery after the market. The correctness of these rulings depends upon the rule as to the measure of damages in such cases.

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In a similar case in Vermont (*King v. Woodbridge*, 34 Vt. 566) it was held that plaintiff could recover as damages the difference between what he was obliged to sell at when the sheep arrived and what he would have received if they had been delivered in time for the market. And in *Cutting v. G. T. R. W. 13 Allen (Mass.) 381*, Judge Gray, said: "The true rule and measure of damages whenever, by reason of unexplained or inexcused delay of the carrier, the goods are not delivered until after they have diminished in market value, is the amount of the diminution. This allows to the person injured the value, as exactly as it can be estimated in money, of that of which he has been deprived by the wrongful act of the defendant." And in *Lehman's Case* the court approved an instruction that the jury might embrace in their verdict any loss sustained by the plaintiff "from decline in the market value between the time when they could have been sold, if they had been transported with due dispatch, and the time when they were actually sold." There was no error therefore in the admission of this evidence. The thirteenth exception was taken to the refusal of the court to strike out the answer of plaintiff to the following question: "Were these the best prices?"—meaning the prices obtained for the delayed cattle—to which the answer was, "Yes; he, Ecker, said he had no market for them." If the objection had been confined to the latter part of this answer, which was not responsive to the question, it should have been stricken out, but as it went to the whole answer, the material part of which was responsive and was proper evidence, the motion was correctly refused.

This brings us to the ruling on the prayers. The defendant's first, fifteenth, twenty-fifth, and twenty-sixth prayers demur to the evidence on the ground that there is no evidence legally sufficient to show negligence under any of the counts in the declaration, and the fifteenth also puts the burden of proof of negligence upon the plaintiff. The twenty-seventh demurs to the evidence offered under the third count, the twenty-eighth to that under the first count, the twenty-ninth to that under the second count, and the thirtieth to that under the fourth count. It follows from what we have said as to the defendant's two propositions of law, and as to the various exceptions, that all these prayers were properly rejected. It is true that the burden of proof is on plaintiff to show negligence. That is in this case negligent or unreasonable delay, but the fifteenth prayer also directed the jury that there was no legally sufficient evidence of any negligence or delay, and in that shape the prayer could not have been properly granted. The defendant's fifth prayer demurred to the evidence on the ground that under the pleadings in this case the plaintiff could not recover for delay in not supplying the car at Barnesville after notice three days previously. We have said the carrier is bound for negligence in not supplying cars on due demand and notice, in

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the absence of some controlling excuse, and in this case there was not only no excuse, but the evidence showed that the defendant diverted the car originally sent to plaintiff, and afterwards forgot to replace it. There was no error in rejecting this prayer. The sixth and tenth prayers of defendant sought to instruct the jury that there was no evidence legally sufficient to show that the defendant accepted cattle to be transported to the market of December 8, 1903, at Union Stockyards, or to any market to be held at any certain time. But, as we have said, this acceptance may be inferred from facts and circumstances, and these were ample in this case for that purpose. These prayers were properly rejected. If the eighth prayer, which asserts that the only duty defendant owed plaintiff in this case was to carry the cattle with reasonable diligence, and avoid unnecessary delay in their delivery, had been confined to the first, second, and fourth counts, it is conceded by the appellee it would have been correct, but it embraced the third count, charging a negligent breach of duty to furnish cars on due notice, and it was correctly rejected. The defendant's twelfth prayer asserts there is no evidence legally sufficient to show that the cattle in cars Nos. 11751 and 11960 were not sold in open market on December 8, 1903, before 11:30 a. m. There is no question of "open market" in this case, and, unexplained, that term would necessarily have confused and misled the jury. If by open market was meant that the sale was made before the close of the regular market as held that day, the prayer should have been so framed as clearly to express that meaning. As offered it was properly rejected. The defendant's thirteenth prayer denies the right to recover if the cattle were delivered at Clairmount before the opening of the market on the morning of December 8, 1903, but the evidence of both parties showed that delivery at the stockyards was not made until the cattle were, in the language of the witness, Pledge, "placed at the pens," and that they have to be so placed by a switch engine. Plaintiff testified that these two cars were not placed at the pens until between 9 and 10 o'clock that morning, and that they were not "his cattle" until they were in the pens, and Pledge himself said they were not placed until 9:30 a. m. As there was no evidence in this case of any loss of weight, or expense incurred in feeding the cattle while detained, the defendant's thirteenth prayer correctly stated the rule for the measure of damages, but this rule was distinctly given in the plaintiff's fourth and fifth prayers as granted, and also in defendant's thirty-first prayer as modified and granted by the court, and there was no injury or error in refusing to repeat the rule in the defendant's thirteenth prayer. The defendant's twenty-third prayer limited the plaintiff's recovery to nominal damages under the whole declaration, and its prayer 32½ sought to impose the same limit as to the first and second counts; but, as there was proof of actual loss by reason of the detention of these cattle, the rejection

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of these prayers was correct. The defendant's thirty-first prayer as offered was confused and contradictory in its terms and was properly rejected. The defendant's thirty-third prayer as offered related only to the cattle mentioned in the first and fourth counts of the declaration, but concluded to the verdict on the whole declaration. The modification by the court corrected this error only, and it was properly rejected as offered. No reference is made in either brief, nor so far as we can remember in the oral argument, of any of the counsel to the defendant's rejected thirty-seventh prayer. The plaintiff denied that he had signed any live stock contract for shipments from Boyds or Barnesville. The station agent at Boyds, Mr. Higgins, thought plaintiff had signed such contracts, but could not say. The agent at Barnesville, Mr. Jameson, said plaintiff usually signed such contract, but could not say he did so on December 7th, and none was produced. We may presume, therefore, this prayer was rejected for want of evidence to support it, and that appellant accepted this ruling as correct. We are of opinion that the plaintiff's fourth and fifth granted prayers as modified by the court correctly state the law as applicable to the facts of the case, and that the plaintiff's ninth prayer as modified by the court, placing upon the defendant the burden of proof to show that plaintiff knew at the time of these shipments the rates charged and the conditions under which the nine-cent rate was made, and that he agreed to ship at said rate, was properly granted. We are of opinion that the whole law of the case was correctly given in the instructions granted upon both sides: and, finding no error in the rejected or granted prayers, the judgment will be affirmed.

Judgment affirmed, with costs above and below.

MALOTT v. CENTRAL TRUST CO. OF GREENCASTLE.

(Supreme Court of Indiana, Nov. 27, 1906.)

[79 N. E. Rep. 369.]

Exceptions, Bill of—Time of Presentation—Recitals.—The recital in a bill of exceptions of the day when it was presented to, or signed by, the judge must be taken as correct, while a general statement therein that the same was presented to the judge within the time allowed will be disregarded.

Appeal—Record—Contents of Record—Conclusiveness.—Whatever is a part of the record proper cannot be made a part of the record by bill of exceptions, and where there is any conflict between the two the record proper will control.

Same—Bill of Exceptions—Time Prescribed for Presentation—Manner of Showing.—The granting of leave during the term to file a bill of exceptions after the close of the term must be shown by an order book entry.

Same—Time of Filing—Recitals.—That, a bill of exceptions was filed and the date of the filing cannot be shown by the recitals in the bill.

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Same—Record Proper—Contents.—The final judgment, the date when rendered, motions for a new trial and in arrest, and the rulings thereon, and the exceptions thereto are a part of the record without a bill of exceptions and can only be shown by being copied into the transcript and certified by the clerk.

Same—Bill of Exceptions—Time of Filing.—To determine the date when final judgment was rendered and the time given within which to file a bill of exceptions, the court must look to the record proper, which must control, and not to the bill of exceptions.

Same.—The record proper disclosed that the bill of exceptions was filed on September 24th, one day after the termination of the 90 days allowed, but the bill showed by a recital therein that it was presented to the judge for his signature on September 23d, and that the same was signed on that day. Held that, under Burns' Ann. St. 1901, § 641, providing that a bill of exceptions, if filed in time, shall be a part of the record notwithstanding a delay of the judge in signing the same, the bill of exceptions was on the record.

Carriers—Passengers—Railway Mail Clerks as Passengers.*—A postal clerk in the service of the United States who is in charge of mail on a train and who is carried on the train as a postal clerk is a passenger.

Trial—Rulings as to Argument of Counsel—Failure to Except—Effect as Waiver.—The failure of a party to except to the court's denial of a motion to discharge the jury and withdraw the submission of the cause because of improper argument of counsel for the adverse party is a waiver of a right to challenge the ruling.

Same—Argument of Counsel—Action of Court.—Counsel for a party made an improper statement in his argument to the jury to which counsel for the adverse party took exceptions and moved the court to discharge the jury. Before the court ruled on the motion the counsel withdrew the statement and asked the jury not to consider it. The court stated that counsel should not go outside the record and instructed the jury that they must not consider the statement and must give no weight to anything said by counsel unless it was supported by the evidence. Held, that the adverse party could not complain of the improper statement of counsel as the court sufficiently admonished the jury not to consider it.

Appeal—Admission of Evidence—Harmless Error.—The admission in evidence in an action for the death of a railway mail clerk, promoted, under the civil service rules, until he had reached the grade where his salary was \$1,000 per annum, that he had been temporarily assigned to fill a vacancy created by an old clerk, which temporary assignment would take effect on a day subsequent to his death if he had lived and that the temporary assignment did not carry with it an increase of salary was not prejudicial.

Same—Exceptions—Sufficiency.—An objection to the admission of evidence on the ground that the same is incompetent, irrelevant, and immaterial, and is not applicable to any issue in the case and does not tend to prove an issue in the case is too indefinite to present any question on appeal.

Same—Objections Reviewable.—Only the specific objections to the

*For the authorities in this series on the question, who are, and are not, passengers, see foot-notes appended to *Graham v. Chicago & N. W. Ry. Co.* (Iowa), 20 R. R. R. 811, 43 Am. & Eng. R. Cas., N. S., 811; foot-notes appended to *Anderson v. Missouri Pac. Ry. Co.* (Mo.), 20 R. R. R. 696, 43 Am. & Eng. R. Cas., N. S., 696; foot-notes appended to *Fitzmaurice v. New York, etc., R. Co.* (Mass.), 20 R. R. R. 635, 43 Am. & Eng. R. Cas., N. S., 635; foot-notes appended to *Glenn v. Lake Erie & W. R. Co.* (Ind.), 20 R. R. R. 60, 43 Am. & Eng. R. Cas., N. S., 60; *Southern Ry. Co. v. Johnson* (Ala.), 20 R. R. R. 58, 43 Am. & Eng. R. Cas., N. S., 58; *Illinois Cent. R. Co. v. Jennings* (Ill.), 20 R. R. R. 15, 43 Am. & Eng. R. Cas., N. S., 15.

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admission of evidence stated to the trial court are available on appeal.

Same—Presumptions—Amount of Verdict.—The court on appeal will not disturb a verdict on the ground that it is excessive unless the damages are so excessive as to indicate that the jury acted from prejudice, partiality, or corruption.

Death—Actions for Causing Death—Damages—Excessive Damages.—In an action for negligent death it appeared that decedent was, at the time of his death, 32 years of age; that he was at that time in the mail service, under civil service rules, earning \$1,000 a year. Held, that a verdict of \$9,500 was not excessive.

Appeal from Circuit Court, Hendricks County; Thos. J. Cofer, Judge.

Action by the Central Trust Company of Greencastle, administrator of Fred. H. Hermesen, deceased, against Volney T. Malott, receiver of the Terre Haute & Indianapolis Railroad Company, for the death of decedent.

Decedent at the time of his death was 32 years of age and left a widow and children. From a judgment for plaintiff for \$9,500, defendant appeals. Affirmed.

J. H. James, Jas. L. Clark and D. P. Williams, for appellant.
S. A. Hays and S. M. McGregor, for appellee.

MONKS, J. This action was brought to recover damages for the death of Fred H. Hermesen alleged to have been caused by the negligence of appellant. A trial of said cause resulted in a verdict and judgment in favor of appellee.

The only error assigned and not waived is that "the court erred in overruling appellant's motion for a new trial." The determination of the question presented by said assignment of error depends upon matters which counsel for appellee insist are not in the record for the reason that the bills of exceptions were not filed in the clerk's office or in open court within the 90 days allowed by the court for that purpose. It appears from the record proper that final judgment was rendered on June 25, 1904, at which time 90 days were given appellant within which to file bills of exceptions, and that the bills of exceptions were filed on September 24, 1904. Counsel for appellant contend, however, that the bills of exceptions show that final judgment was rendered on June 30, 1904, at which time 90 days were given appellant to file bills of exceptions and that there being a conflict between the record proper and the bills of exceptions as to the date of final judgment the bills of exceptions control. The contention of the appellant is true only to a limited extent, for the reason that only as to such matters as may be properly shown by a bill of exceptions will it control. Thus the recital in a bill of exceptions of the day when it was presented to, or signed by, the judge must be taken as correct, but the general statement therein that the same was presented to the judge within the time allowed will be disregarded. Ewbank's Manual, §§ 24, 25, and 36, p. 47; 3 Works Prac. & Pleading (4th Ed.) 506, 507, notes; Wood v. Ohio, etc., Co., 136 Ind. 598, 601, 36

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N. E. 282. Whatever is a part of the record proper without a bill of exceptions cannot be made a part of the record by a bill of exceptions, and, if there is any conflict between the two as to such matters, the record proper will control. *Wilson v. State*, 156 Ind. 631, 635, 636, 59 N. E. 380, 60 N. E. 1086, and authorities cited; *Harris v. State*, 155 Ind. 15, 56 N. E. 916; *Cooney v. American Ins. Co.*, 161 Ind. 193, 194, 195, 67 N. E. 989, and cases cited; *Ewbank's Manual*, § 25; 3 *Ency. Pl. & Pr.* 404-406.

That leave was given during the term to file a bill of exceptions after the close of the term must be shown by an order book entry, and that the bill of exceptions was filed in the clerk's office and the date of filing cannot be shown by recitals in the bill. *Ewbank's Manual*, p. 38, §§ 30, 31; 3 *Works Pr. & Pl.* (4th Ed.) 518, 519, notes; *Gray v. Singer*, 137 Ind. 257, 36 N. E. 209, 1109; *Hancher v. Stephenson*, 147 Ind. 498, 46 N. E. 916; *Schoonover v. Reed*, 65 Ind. 313; *Board, etc., v. Huffman*, 134 Ind. 1, 31 N. E. 570; *Drake v. State*, 145 Ind. 210, 217, 41 N. E. 799, 44 N. E. 188; *Miller v. Evansville, etc., Ry. Co.*, 143 Ind. 570, 41 N. E. 801, 42 N. E. 806; *Prather v. Prather*, 139 Ind. 570, 39 N. E. 310.

Final judgment, the date when rendered, motions for a new trial, and in arrest of judgment, and the rulings thereon, and the exceptions thereto, are a part of the record without a bill of exceptions, and cannot be brought into the record by a bill of exceptions. *Wilson v. State*, 156 Ind. 631, 635, 636, 59 N. E. 380, 60 N. E. 1086, and authorities cited; *Harris v. State*, 155 Ind. 15, 56 N. E. 916; *Wurfel v. State*, (Ind. Sup.) 78 N. E. 635; 3 *Ency. Pl. & Pr.*, 604-606. It is evident that under the authorities cited final judgments, motions for a new trial, and in arrest of judgment, and the exceptions thereto and the dates thereof, and all other matters which are a part of the record without a bill of exceptions can only be shown by being copied into the transcript and duly certified by the clerk as a part of the record proper without a bill of exceptions. It follows that, to determine the date when final judgment was rendered and time given within which to file bills of exceptions, we must look to the record proper, which must control, and not to the bills of exceptions. This date as we have shown was June 25, 1904.

The record proper discloses that the bills of exceptions were filed on September 24, 1904, one day after the termination of the 90 days allowed, but the bills of exceptions show by recitals therein that they were presented to the judge for his signature, one on September 22d, and two on September 23d, and that each was signed on the day presented, which was within the 90 days allowed by the court. It has been uniformly held by this court since the taking effect on September 19, 1881, of section 406, Code Civ. Proc. (section 641, Burns' Ann. St. 1901. § 629, Rev. St. 1881, and Horner's Am. St. 1901) that if the bill of exceptions is presented to the judge for his signature

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within the time allowed and the date of presentation is shown in the bill of exceptions, such bill of exceptions is in the record, although it is signed and filed after the expiration of the time allowed. Ewbank's Manual, §§ 31, 32; McCoy v. Able, 131 Ind. 417, 30 N. E. 528, 31 N. E. 453; Wysor v. Johnson, 130 Ind. 270, 30 N. E. 144. It follows that, as the said bills of exceptions were presented to the judge for his signature within the 90 days allowed from June 25, 1904, they are a part of the record, although filed after the expiration of the time allowed by the court, and must be considered in determining the questions presented by the error assigned.

The causes assigned for a new trial and not waived are: "(1) The verdict of the jury is not sustained by sufficient evidence. (2) Misconduct of one of the counsel for appellee in his closing argument. (3) Admission of certain testimony over the objection of appellant" [which is set forth in the motion for a new trial]. (4) The damages assessed are excessive." The theory of the complaint as set forth in both paragraphs was that the relation of passenger and carrier existed between appellee's decedent and appellant at the time he received the injury which caused his death, and that the same was caused by the negligence of appellant. The first paragraph alleged that appellee's decedent was, at the time of the injury, a postal clerk in the service of the United States, and was in that character being carried on appellant's train under a contract between the United States and appellant, by the terms of which appellant agreed to carry the mails and postal clerks in charge of them for a consideration paid by the government. The second paragraph alleged generally that the decedent was a passenger for hire at the time of his injury.

Appellant insists that the evidence was not sufficient to sustain the verdict as to the first paragraph of complaint because there was no evidence of any such contract as that alleged, and that the evidence was not sufficient to sustain the verdict as to the second paragraph because there was no evidence "that the decedent paid or intended to pay his fare, or that he had been received and accepted by appellant as a passenger, or that the relation of passenger and carrier had otherwise been created." A statute of the United States making it the duty of railroad companies carrying mail to "carry on any train which may run over its road and without extra charge therefor mailable matter directed to be carried thereon with the persons in charge of the same." The greater weight of authority is to the effect that railroads owe the same degree of care to postal clerks and mail agents riding in the postal car in charge of the mail as they do to passengers riding upon the train. Ohio, etc., Ry. Co. v. Voight, 122 Ind. 288, 23 N. E. 774; Cleveland, etc., Ry. Co. v. Ketcham, 133 Ind. 346, 350, 354, 33 N. E. 116, 19 L. R. A. 339, 36 Am. St. Rep. 550; Seybolt v. Lake Erie, etc., Ry. Co., 95 N. Y. 562, 47 Am. Rep. 75, 79, *et seq.*; Gleeson v. Virginia,

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etc., Ry. Co., 140 U. S. 435, 11 Sup. Ct. 859, 35 L. Ed. 458; *Magoffin v. Missouri Ry. Co.*, 102 Mo. 540, 15 S. W. 76, 22 Am. St. Rep. 798; *Gulf, etc., Ry. Co. v. Wilson*, 79 Tex. 371, 15 S. W. 280, 11 L. R. A. 486 and note, 23 Am. St. Rep. 345; *Southern, etc., Ry. Co. v. Cavin*, (C. C. A.) 144 Fed. 348; *Chamberlain v. Pierson*, 31 C. C. A. 165, 87 Fed. 420; 3 Thompson Com. on Neg., § 2649, and cases cited in note 120, p. 115. It was clearly shown by the evidence that appellant was engaged in carrying the United States mails on its trains under some arrangement with the Federal government, and that the decedent was a postal clerk in the service of the United States in charge of such mail on appellant's train and was being carried as a postal clerk on appellant's train at the time he received the injury which caused his death, the same being caused by a "head-end collision of two of appellant's trains on appellant's railroad." He had been traveling as such postal clerk on appellant's road for several years before his injury. Under the authorities above cited said evidence clearly shows that appellant owed to appellee's decedent while riding in the postal car as a postal clerk on its train at the time of his injury the same duty it owed a passenger riding on the train; that the relation of passenger and carrier existed between them. It follows that said objections to the sufficiency of the evidence are not tenable.

In the closing argument made by one of the counsel for appellee he made a certain statement to the jury to which counsel for appellant "took exceptions and moved the court to discharge the jury and set aside the submission of said cause." Before the court ruled on said motion said counsel for appellee withdrew the statement to which appellant had objected and asked the jury not to consider it, and the court thereupon said "that counsel must not go outside the record" and instructed "the jury that they must not consider the statement made by counsel outside the record, and must give no weight to anything said by counsel unless it was supported by the evidence, but, in making up their verdict in the case, they should be governed solely by the facts proved, and overruled said motion of appellant" to discharge the jury and withdraw the submission of said cause. No exception was reserved to this ruling by appellant. The exception must be to some ruling of the court and not to the conduct of the attorney. *Southern, etc., Ry. Co. v. Fine*, 163 Ind. 617, 623, 624, 72 N. E. 589; *Coppenhaver v. State*, 160 Ind. 540, 548, 67 N. E. 453; *Robb v. State*, 144 Ind. 569, 571, 572, 43 N. E. 642. The failure of appellant to except to the action of the court in overruling said motion was a waiver of any right to challenge the correctness thereof. *Elliott's App. Proc.*, § 783 on page 742. Even if such exception had been taken we think appellant has no just cause to complain, as the court without delay admonished the jury not to consider said objectionable statement. This was all appellant was entitled to ask. *Southern, etc., Ry. Co. v. Fine*, 163 Ind. 623, 624, 72 N. E. 589, and cases cited.

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Appellee proved without objection that the decedent had entered the mail service as a postal clerk at an annual salary of less than \$800, and had been promoted under the civil service rules until he had reached a grade where his salary was \$1,000 per annum. Mr. Ball, chief clerk of the railway mail service, testified on behalf of appellee, that on October 14, 1904, the day before the collision in which Hermesen was killed, the decedent had been assigned temporarily to fill a vacancy created by an old clerk who wanted a lighter run and who was willing to receive a reduction in salary in order to get it. This temporary appointment would have taken effect November 21, 1904, if he had lived. His salary would have been the same in this temporary assignment as it was in the position he already had; it carried no increase of salary. Counsel for appellant objected to the evidence as to the date said assignment would take effect and what his salary would have been under such assignment, on the ground that it is "speculative, prospective, and refers to something in the future; it would not tend to prove that the decedent, Mr. Hermesen, could have filled the position if there was a vacancy; it is simply a matter that was operating in the minds of the witnesses and other officers and it refers to something to take place after his death, and the amount of his salary under such assignment does not tend to prove the nature of his service or the measure of damages in this case." These objections were overruled, and appellee was permitted to prove by said witness that said assignment would have taken effect on November 21, 1904, and that it carried no increase of salary. We think the evidence was properly admitted. The assignment was made and signed before the collision in which the decedent was injured, and it did not simply rest in the minds of the witness and other officers, but was an act done. There being no increase in salary it could not affect the amount of damages. It is evident that this evidence, even if erroneously admitted, did not harm appellant.

It was assigned as the 23d cause for a new trial that the court erred in permitting a witness for appellee to answer a question which is set forth in the motion for a new trial over the objection and exception of appellant. The objection stated by appellant to the question was that "it is incompetent, irrelevant, and immaterial, and does not tend to prove any issue in the case." The 26th cause for a new trial was on the ground that the court erred in admitting certain evidence over appellant's objection. The objection stated by appellant was that "it is not applicable to any issue in the case, and does not tend to prove the earning capacity of the decedent in this case." It is well settled that said grounds of objection stated in the court below were too indefinite, uncertain, and general to present any question. *Hicks v. State*, 165 Ind. 440, 75 N. E. 641, and cases cited; *Musser v. State*, 157 Ind. 423, 430, 431, 61 N. E. 1, and authorities cited; *Ohio, etc., Ry. Co. v. Walker*,

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113 Ind. 196, 200, 201, 15 N. E. 234, 3 Am. St. Rep. 638. Moreover the objections made in the court below to the admission of the evidence set forth in the 23d and 26th causes for a new trial are not urged in this court, but a different objection is made.

It is settled that only the specific objections to the admission of evidence stated to the trial court are available on appeal, for the reason that objections not made in the court below will not be considered on appeal. *Musser v. State*, 157 Ind. 423, 431. 61 N. E. 1, and cases cited; *Ohio, etc., Ry. Co. v. Walker*, 113 Ind. 196, 201, 15 N. E. 234, 3 Am. St. Rep. 638.

It is settled that courts on appeal will not disturb a verdict on the ground of excessive damages unless the damages are so excessive as to indicate that the jury acted from prejudice, partiality, or corruption. *Indiana Car Co. v. Parker*, 100 Ind. 181. 196, and cases cited; *Louisville, etc., Ry. Co. v. Miller*, 141 Ind. 533, 566, 37 N. E. 343; *Woollen's Trial Procedure*, §§ 4409, 4411. Under this rule we cannot say the damages are excessive.

Judgment affirmed.

YAZOO & M. V. R. Co. v. BYRD *et al.*

(Supreme Court of Mississippi, Dec. 3, 1906.)

[42 So. Rep. 286.]

Carriers—Negligence of Passenger—Riding on Car Platform.*—A passenger thrown from a train is not guilty of contributory negligence as matter of law because he is riding on the car platform; the cars having been so overcrowded with passengers as to make it impossible to obtain a seat in a safe place.

Appeal—Waiver of Objections to Instructions.—Where a requested instruction is erroneous, the party asking it cannot assign as error the modification of it; the instruction having been used before the jury. To avail himself of any error in the modification, he should have declined to read it to the jury.

Carriers—Injury to Passenger—Negligence—Instructions.†—An instruction that a carrier is not liable for injury to a passenger thrown from the platform of a car, if the injury occurred to him while he was voluntarily on the platform, if there was no necessity for his being there, if the injury happened by reason of the "usual and ordinary operation and running of the train," is erroneous, as the operation of the train must also have been reasonably safe.

Same—Contributory Negligence—Instruction.—An instruction, in an action for injury to a passenger thrown from the platform of a

*For the authorities in this series on the question whether it is contributory negligence in a passenger to ride on the platform of a car, see foot-notes appended to *McDonough v. Boston Elev. Ry. Co.* (Mass.), 20 R. R. R. 641, 43 Am. & Eng. R. Cas., N. S., 641; foot-notes appended to *Jackson v. Natchez & W. Ry. Co.* (La.), 19 R. R. R. 385, 42 Am. & Eng. R. Cas., N. S., 385.

†See extensive note, 18 R. R. R. 296, 41 Am. & Eng. R. Cas., N. S. 296.

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car, that the carrier is not liable if the injury to the passenger was due "in part" to the fact that he was on the platform voluntarily and unnecessarily, is erroneous. To exculpate the company from liability, the passenger's negligence must have been such as materially contributed to the accident.

Same—Negligence—Instructions.—An instruction that a carrier is not liable for injury to a passenger if he was thrown from the train while unnecessarily standing on the car platform, while the train was passing from a straight track to a curve, is erroneous, in not adding the condition that the train was being run around the curve with "all due care."

Same—Negligence after Accident.†—Though negligence of a passenger contributed to his being thrown from a train, yet, the carrier having left him on the ground in the hot sun and rain for three hours without attention, when it was only four or five miles to the next station, it is liable for the damages suffered by him through its neglect to give him proper attention after the accident.

Appeal from Circuit Court, Hinds County; D. M. Miller, Judge.

Action by Bertha Byrd and others against the Yazoo & Mississippi Valley Railroad Company. Judgment for plaintiffs. Defendant appeals, and plaintiffs bring a cross-appeal. Affirmed.

Mayes & Longstreet and Williamson, Wells & Peyton, for appellant.

Green & Green, for appellees.

MAYES, J. Some time in June, 1904, Hiram Byrd took passage on one of the trains of the Yazoo & Mississippi Valley Railroad Company from Natchez to New Orleans. The train on which he took his passage was an excursion train, and there is considerable conflict in the testimony as to whether or not the train was overcrowded on that occasion; but there is much testimony going to show that the train was crowded, and for this reason Hiram Byrd took a position on the platform of one of the cars, instead of taking his seat on the inside. There is also some testimony tending to show that Mr. Byrd had been drinking, and that at the time the accident befell him he was intoxicated. Mr. Byrd was a barber, about 30 years of age, and when at work earned about \$15 to \$20 a week, according to some of the testimony. After passing Harrison, a station on appellant's line of railway, and while the train was turning a curve near Applewhite, Mr. Byrd was either suddenly jarred off by the lurch of the train while turning this curve, or he was accidentally pushed off by some of his companions. At all events, he fell from the train while standing outside on this platform. The passengers on board of the train immediately made known this fact to the conductor, and asked that the train be stopped and Mr. Byrd taken aboard. The conductor refused to do this, assigning as a

†For the authorities in this series on the subject of the liability of railroad companies for the negligence of physicians and others in charge of sick or injured persons, see foot-notes appended to *Illinois Cent. R. Co. v. Buchanan* (Ky.), 19 R. R. R. 521, 42 Am. & Eng. R. Cas., N. S., 521.

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reason that another train was soon due to follow, and he could not stop his train at this place, but, when he reached the next station, some short distance further down, he would send back for Byrd. After reaching this station, Mr. Byrd was not sent back for immediately, and was not picked up for about three hours. In short, he was left to lie alongside of the track, where he had fallen, without any attention, in midsummer, for three hours or more, and in the meantime there came up a heavy rain, which he was in. Mr. Byrd died on September 6, 1904, in Wesson, Miss., after having spent some time in the hospital at Natchez. It was also testified to by one of the physicians in attendance on Byrd at Natchez—Dr. Chamberlain—that he had treated Byrd in May, 1904, for incipient tuberculosis, and that Byrd had marked symptoms of consumption; that he saw Byrd after the accident, and that he had only suffered some minor bruises, was walking around, and complained of his ankle; and that the injury received was not calculated to produce death, in his judgment. Dr. Brown, the physician in charge of the Natchez Hospital, stated that he had known Byrd for about 10 years, and that he had been several times in the hospital suffering from acute alcoholism and paralysis. When Byrd came to the hospital suffering from the injuries received from the fall, he made an examination of him, and he could not have died from the injuries received. Dr. Lamb Rowan, the physician at Wesson, who last attended him, stated that Byrd died of septicæmia. A peremptory instruction was asked for after appellees had introduced their evidence, and refused by the court, and we think properly refused. There was a judgment for plaintiffs in the sum of \$1,000, and the railroad company appeals, and a cross-appeal is taken by appellees.

The fact remains that Byrd fell from the train under circumstances which may or may not have prevented his recovering anything against the company, according to the circumstances, and was allowed to lie in the sun and beating rain for three hours after he had fallen, without attention from any one, save by a negro in no way connected with the railroad company, who, seeing that a rain was coming up, pulled him out of a gully into which he had fallen, to save him from drowning. All the facts were submitted to the jury—the fact of Byrd's being on the platform; the fact of his being permitted to remain exposed to sun and rain for three hours; the testimony of the physicians, and as to his intoxicated condition—and, the jury having passed on the facts and holding the company liable, we are not warranted by anything that appears in the record in disturbing their verdict on the facts. It was not negligence per se, under the facts shown in this case, for Mr. Byrd to be out on the platform, instead of inside of the car; but it was a question to be passed on by the jury. Appellant cannot overcrowd its cars with passengers, making it impossible to obtain seats in safe places, and excuse itself from liability by saying a

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passenger under these circumstances was riding in a dangerous place. Ordinarily it is negligence to ride on the platform of a car, instead of in the place which is provided for the seating of passengers inside; but this is not an inflexible rule, and, when the railroad company has failed to provide sufficient cars to seat its passengers, it then becomes a question of fact as to whether a passenger was or was not guilty of negligence in riding on the platform. This question was properly submitted to the jury under proper instructions, and we see no error. *Lehr v. Steinway*, 23 N. E. 889; 2 Wood on Railroads, § 308. The facts in this case are widely different from the facts in the case of *Dougherty v. Railroad Co.*, 84 Miss. 502, 36 South. 609, and that case has no application here. Mr. Dougherty was thrown from the train in trying to pass from one car to another, in the nighttime, while the train was running on a three-degree curve at a rate of speed of 45 or 50 miles an hour, and the court held that if the act of going from one car to another under the circumstances was voluntary, which question had been submitted to the jury and passed on by them in favor of the railroad company; i. e., that it was voluntary on the part of Dougherty, that the accident was the result of Dougherty's negligence, and he could not recover. It was not attempted to be shown in that case, as in this, that his going on the platform was due to the overcrowding of the cars, thereby making it necessary to stand on the platform.

It is further insisted by defendants that the court erred in modifying the first, fifth, seventh, and eighth instructions asked by them. We are relieved from the necessity of discussing whether or not the modifications complained of did or did not constitute error, since the original instructions themselves were incorrect. The court held in the case of *Miss. Cent. R. R. Co. v. Hardy* (Miss.) 41 South. 508, that where an instruction is asked, which is erroneous and is modified by the court, the modification of the instruction cannot be assigned as error, where the instruction has been used before the jury. If the party asking the instruction is not content with it as modified, he should decline to read it to the jury, in order to avail himself of any error in the action of the court. See, also, *Railroad Co. v. Suddoth*, 70 Miss. 265, 12 South. 205.

By the first instruction the jury are told that defendant company is not liable if the injury occurred to Byrd while he was voluntarily on the platform, if there was no necessity for his being there, if the injury happened "by reason of the usual and ordinary operation and running of the train." The "usual and ordinary operation and running of the train" might itself have been negligent, and the jury should have been told by the instruction that the defendant company was not liable for any damage which occurred "by reason of the usual and ordinary operation of the train," if they further believe from the evidence that such usual and ordinary operation and running of the train was reasonably safe; but the jury are left to sur-

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mise as to whether or not the operation of the train was reasonably safe, and this, in the face of some testimony which went to show that the train was running around a four-degree curve over a track not in perfect condition.

The fifth instruction is wrong for the same reason as the first, in that it also tells the jury that defendant is not liable under the circumstances enumerated in the instruction if they believe that the train was being operated in the usual and customary manner, without further stating that they must believe from the evidence the usual and customary manner of operating the train was reasonably safe.

The seventh instruction is wrong, because by it the jury are told that the company is not liable if they believe from the evidence that the injury to Byrd was due in part to the fact that he was occupying a position on the platform voluntarily and unnecessarily. This is not the law. Negligence of the character which exculpates the company from any liability must have been such negligence on the part of Byrd as materially contributed to the accident. It is not every negligent act, singly and alone, not materially contributing to an injury, which will relieve from liability, and the statement of the law in the instruction was incorrect and misleading.

By the eighth instruction, which is also wrong, the jury are told that the company is not liable if they believe from the evidence that Byrd was thrown from the train while unnecessarily standing on the platform, or steps, when the train was passing from a straight track to a curve. The instruction should have stated that the company was not liable, under these circumstances, if they believe from the evidence that the train was being run around this curve with all due care. Railroads owe to their passengers the consideration and care of common humanity. It matters not how negligent a passenger may have been in producing the injury for which he sues. It does not absolve the railroad from the duty which it owes to him of proper attention after an accident shall have occurred, and if, when injured, the railroad company neglects this care, which common humanity would dictate, and by reason of this neglect, after the injury has occurred, a passenger suffers damage, he may recover against the railroad company for its dereliction. It was the duty of the company to bring Byrd to a place where he could receive proper treatment, and that with reasonable promptness, and not to have left him in his helpless condition, lying alongside of the track, in the hot sun and beating rain, for more than three hours, when it was not more than four or five miles to the next station from the place where he fell, and, to use the language of the conductor, "for humanity's sake there should have been something done for him." *Dyche v. Railroad Co.*, 79 Miss. 361, 30 South. 711; *Northern Cent. Ry. Co. v. State*, 29 Md. 439, 442, 96 Am. Dec. 545; *Baltimore & O. R. Co. v. State*, 41 Md. 288.

Let the cause be affirmed, on appeal and cross-appeal.

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(Supreme Court of Oklahoma, Sept. 5, 1906.)

[87 Pac. Rep. 470.]

Pleading—Verification—Necessity—Judgment on Pleading.—Where an action is brought against a railroad company to recover damages for the killing and injury of certain horses shipped over the road, and where the petition alleges that the horses were shipped under the terms of a written contract between the plaintiff and defendant evidenced by a bill of lading, and where the same is attached to the petition, marked "Exhibit A" and made a part thereof, and where said bill of lading contains the provision, "No carrier shall be responsible for loss or damage of any of the freight shipped, unless it is proved to have occurred during the time of its transit over the particular carrier's line, and of this, notice must be given within 30 hours after the arrival of the same at destination," and where written across the face of such bill of lading are the words "released per contract," and where the contract thus referred to is set up in the answer of the defendant, and a copy thereof is attached to said answer as an exhibit, and where such contract contains a provision "that, as a condition precedent to a recovery for any damages for delay, loss or injury to live stock covered by this contract, the second party will give notice in writing of the claim therefor to some general officer, or the nearest station agent of the first party, or to the agent at destination, or some general officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the delivery of such stock at destination, to the end that such claim shall be fully and fairly investigated; and that a failure to comply with the provisions of this clause shall be a bar to the recovery of any and all such claims." And, where it is alleged in said answer that this provision of the contract has not been complied with, and where the plaintiff files a reply setting up only a general denial, unverified, such written contract is thereby admitted, and where neither the petition or the reply contains an allegation of compliance with the conditions of the bill of lading or contract, and the said pleadings on the part of the plaintiff contain no allegation of waiver of such contract, and no facts are alleged therein tending to show an actual or substantial compliance with the said bill of lading or contract and no excuse is offered or set up in the pleadings for their noncompliance, said pleadings do not state a cause of action in favor of the plaintiff, and a motion for judgment for the defendant on the pleadings should be sustained in the absence of any allegation for leave to amend by the plaintiff.

Carriers—Limiting Liability.*—The responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable, and not inconsistent with sound public policy. Hence, an agreement

*For the authorities in this series on the power of a common carrier to limit its liability, see foot-notes appended to *Louisville & N. R. Co. v. Smith* (Ala.), 19 R. R. R. 775, 42 Am. & Eng. R. Cas., N. S., 775; *Central of Georgia Ry. Co. v. Hall* (Ga.), 19 R. R. R. 741, 42 Am. & Eng. R. Cas., N. S., 741; foot-notes appended to *Anderson v. Mobile & O. R. Co.* (Miss.), 19 R. R. R. 382, 42 Am. & Eng. R. Cas., N. S., 382; *Everett v. Norfolk & S. R. Co.* (N. Car.), 18 R. R. R. 551, 41 Am. & Eng. R. Cas., N. S., 551; *Eckert v. Pennsylvania R. Co.* (Pa.), 18 R. R. R. 475, 41 Am. & Eng. R. Cas., N. S., 475; *Nevius v. Chicago, etc., Ry. Co.* (Wis.), 18 R. R. R. 65, 41 Am. & Eng. R. Cas., N. S., 65.

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that, in case of failure by the carrier to deliver goods, he shall not be liable, unless a claim shall be made by the bailor or by the consignee within a specified period, if that period be a reasonable one, is not against the policy of the law, and is valid.

Same—Special Contract.—The common-law liability of a common carrier for the safe carriage of goods may be limited and qualified by special contract with the owner, provided such special contract does not attempt to cover losses occasioned by neglect or misconduct.

Same—Notice of Claim for Damages.†—A stipulation in a contract of affreightment of live stock, requiring the owner to give notice in writing of his claim for damages to some officer of the company or its nearest station agent, before the stock is removed from the place of destination, is a reasonable stipulation and binding on the owner, and he cannot recover on failure to give such notice, though he did not go in person, or send an agent, with the stock, as in such cases he should have sent a copy of his contract to the consignee, in order that the latter might have complied with the stipulation.

Same—Time for Giving Notice.—Whether the time provided by the contract for giving notice of loss is reasonable or unreasonable is a question of fact to be determined by the circumstances of the case. (Syllabus by the Court.)

Error from Probate Court, Oklahoma County; before Justice Wm. P. Harper.

Action by D. M. Phillips against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff, and defendant brings error. Reversed and remanded.

On June 28, 1904, D. M. Phillips commenced this action in the probate court of Oklahoma county against the St. Louis & San Francisco Railroad Company, by filing his petition therein, claiming damages in the sum of \$300 for the killing of one horse and the injuring of three others while being transported by the railroad company from Oklahoma City, O. T., to Hoxie, Ark. On April 21, 1905, Phillips filed an amended petition, setting out in addition to the foregoing allegations, a copy of the bill of lading, and on it was indorsed, "released per contract." One of the provisions of said bill of lading is as follows: "No carrier shall be responsible for loss or damage of any of the freight shipped, unless it is proved to have occurred during the time of its transit over the particular carrier's line, and of this, notice must be given within thirty hours after the arrival of the same at destination." On the 29th of April, 1905, the railroad company filed its answer in said cause, which, after containing a general denial, set up by way of further defense the execution of a live stock contract with Phillips covering said shipment, copy of which was attached to said answer and marked "Exhibit A." It is alleged in said answer "that, by the terms of said contract, it is, among other things, specifically provided that, as a condition precedent to a recovery for any

†For the authorities in this series on the subject of notice of claims against railroads, see foot-notes appended to *Mumford v. Chicago, etc., Ry. Co. (Iowa)*, 20 R. R. R. 431, 43 Am. & Eng. R. Cas., N. S., 431; *Reynolds v. Great Northern Ry. Co. (Wash.)*, 20 R. R. R. 70, 43 Am. & Eng. R. Cas., N. S., 70.

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damages for delay, loss, or injury, the shipper must give notice in writing to the nearest agent of the company within one day after the delivery of such stock at destination, and before the removal of the same from such destination, and defendant specifically avers that such notice in writing was not given as required, and plaintiff did not attempt to give such notice or make claim to any agent or officer of the company before said stock were removed from destination or mingled with other stock, and defendant had no notice of the alleged damage, or opportunity to investigate the same before said stock were so mingled and removed, and that therefore plaintiff is not entitled to recover under such contract for the injury, if any, sustained." The provision of the contract referred to is section 11, and reads as follows: "That, as a condition precedent to a recovery for any damages for delay, loss, or injury to live stock covered by this contract, the second party will give notice in writing of the claim therefor to some general officer or nearest station agent of the first party, or to the agent at destination, or to some general officer of the delivering line, before such stock is removed from the point of shipment or from the place of destination, and before such stock is mingled with other stock, such written notification to be served within one day after the delivery of such stock at destination, to the end that such claim shall be fully and fairly investigated; and that a failure to comply with the provisions of this clause shall be a bar to the recovery of any and all such claims." To that part of the answer setting up this defense, the plaintiff filed a demurrer, which demurrer was overruled on the 27th day of May, 1905. Thereupon plaintiff filed a reply to said answer, which was a general denial, unverified. On the 9th day of June, 1905, plaintiff in error filed his motion in said cause for judgment on the pleadings, which motion was overruled by the court and exceptions noted. The cause came on for trial on the 9th day of June, 1905, a jury being impaneled. Plaintiff in error objected to the introduction of any evidence on the part of the defendant in error, on the ground that the petition and reply did not state facts sufficient to constitute a cause of action, which objection was overruled by the court and exceptions noted. The plaintiff introduced his evidence and rested, and the railroad company, defendant, demurred thereto, which demurrer was overruled by the court, and exceptions saved. Thereupon evidence was introduced on behalf of the defendant, and at the conclusion thereof, plaintiff in error requested the court to give the jury a peremptory instruction to return a verdict for the defendant railroad company, which was overruled by the court, and exceptions saved. The defendant also requested the court to give to the jury instructions numbered 1 to 13, which the court refused to give, to which the plaintiff in error excepted. At the request of the plaintiff in error, the court submitted to the jury 28 special interrogatories. The case having been submitted

to the jury, they returned into court a verdict in favor of the defendant in error in the sum of \$186.25, and also returned special findings of fact to the special interrogatories submitted to them. Thereafter, and on the 13th day of June, plaintiff in error filed its motion in said cause for judgment on the findings notwithstanding the verdict of the jury, which motion was overruled, and exceptions noted, and judgment was thereupon entered for the defendant in error on the general verdict. From said order, and the order of the court overruling a motion for new trial, the plaintiff in error brings this appeal.

Flynn & Ames and *R. A. Kleinschmidt*, for plaintiff in error.
T. F. McMechan, for defendant in error.

IRWIN, J. (after stating the facts.) The plaintiff in error seeks a reversal of this judgment on six different grounds: First. That plaintiff in error was entitled to judgment on the pleadings in said cause, and the court erred in overruling his motion therefor. Second. The court erred in not sustaining the objection of the plaintiff in error to the introduction of any evidence by the defendant in error, on the grounds that the pleadings did not state a cause of action in favor of the plaintiff. Third. The court erred in overruling the demurrer of the plaintiff in error to the evidence. Fourth. The court erred in refusing the peremptory instruction asked by plaintiff in error, and in giving the instructions to the jury that were given. Fifth. The court erred in not sustaining the motion of plaintiff in error for judgment on the special findings, notwithstanding the general verdict. Sixth. The court erred in overruling the motion of plaintiff in error for a new trial in said cause.

The first and second assignments of error may very properly be discussed as one, as the same proposition of law is involved in both, and practically the same state of facts is presented thereby, to wit, that the pleadings of the defendant in error were wholly insufficient to state a cause of action, and for this reason the defendant was entitled to a judgment on the pleadings. The amended petition set up a copy of the bill of lading for the shipment in question which contained a clause requiring the shipper, as a condition precedent to claiming damage, to give notice thereof within 30 hours after the arrival of the same at destination, and said bill of lading specially referred to another contract in these words, "released per contract," which words were written plainly across the face of the bill of lading. Record, p. 10. The answer of the railroad company set up a copy of the contract referred to, alleged its execution by the plaintiff, Phillips, and specially alleged the failure of the plaintiff to comply with the condition precedent in his said contract. The reply filed to this answer by plaintiff was a general denial, unverified, and therefore admitted the execution of said contract as alleged, under the statutes of this territory. Wilson's Rev. & Ann. St. Okl., 1903, § 4312, reads as follows: "In all

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actions, allegations of the execution of written instruments and indorsements thereon, of the existence of a corporation or partnership, or of any appointment or authority, or the correctness of any account duly verified by the affidavit of the party, his agent or attorney, shall be taken as true unless the denial of the same be verified by the affidavit of the party, his agent or attorney." Therefore, the execution of the contract being admitted, and the bill of lading referring thereto and containing practically the same provision in regard to notice as a condition precedent to any claim for damage accruing to the shipper, the compliance with said condition precedent, and with the terms of said contracts, could not be predicated or gathered from a general denial. It would certainly seem to be the duty of the defendant in error, upon admitting the execution of the contract, to either especially allege compliance with the terms thereof, or to especially plead some of the facts, if any such there were, which might tend to show a substantial compliance with the terms of said contract, and which might tend to relieve him from compliance therewith, or he should, in some form, have alleged a waiver of the terms of said contract on the part of the defendant. Neither of these things were done by the defendant in error. Now it is a well-recognized principle of pleading, that where a party relies for his cause of action upon a breach of a written contract, the burden is upon him to allege and prove every material element necessary to his recovery thereunder. In other words, before he can complain of a breach of contract on the part of another party, he must show that he has actually or substantially complied with the terms of the contract himself, or has been released therefrom by the other party. Now, in this case, this bill of lading, and the reference of the shipping contract contained therein, was first brought into the case by the plaintiff in his petition, and was attached to the petition of the plaintiff as an exhibit, and made a part thereof. Upon this bill of lading, and its accompanying contract of shipping, the plaintiff based his cause of action. This, of itself, would put upon the plaintiff the responsibility of proving compliance with the material parts of said contract on his part. This is peculiarly true when we remember that the noncompliance with the essential parts of this contract was alleged in the answer of the defendant. The plaintiff's attention was called to the particulars in which he had failed to comply with the contract, and his attention was challenged to that proposition by the answer of the defendant. Then no legal denial of the contract was pleaded, no claim of compliance, either actual or substantial, and no claim of waiver was made. Now, if this provision of the bill of lading and the shipping contract was such a provision as was reasonable, valid, and enforceable as a matter of law, then the burden was upon the plaintiff, not only to prove, but to allege in his pleadings, a compliance with the terms of the contract for a breach of which he sues. Now, the

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proposition presents itself, was this provision of the bill of lading and shipping contract a reasonable one, and one which the law would enforce? The validity of a contract of this nature and of this special provision requiring notice in writing to be given of the loss or injury within a reasonable time as a condition precedent to the shipper's right of action has been so repeatedly and often supported by the decisions of the various courts of this country as to become a well-recognized and settled rule of law. •

In the case of *Southern Express Co. v. Caldwell*, reported in 21 Wall. 264, 22 L. Ed. 556, the Supreme Court of the United States say: "The responsibility of a common carrier may be limited by an express agreement made with his employer at the time of his accepting goods for transportation, provided the limitation be such as the law can recognize as reasonable, and not inconsistent with sound public policy. An agreement that, in case of failure by the carrier to deliver goods, he shall not be liable, unless a claim shall be made by the bailor or by the consignee, within a specified period, if that period be a reasonable one, is not against the policy of the law, and is valid." In 6 Cyc. 508, it is held that a stipulation that the claim for damages shall be made before the animals are removed from the place of delivery, and mingled with other animals, is valid. Other stipulations for a short time, of giving notice of damages in case of live stock, have been sustained, and numerous authorities are therein cited to sustain this proposition. In the case of *Texas Central R. Co. v. Morris*, 1 White & W. Civ. Cas. Ct. App., § 374, it is said: "A railroad company may, by special contract, require a shipper of cattle to serve a written notice of a claim for damages for loss or injury to the cattle while in transit, before the cattle are removed from the place of delivery and mingled with other stock, as a condition precedent to his right to recover for such damages." In the case of *Galveston, H. & S. A. Ry. Co. v. Harman*, 2 Willson's Civ. Cas. Ct. App., §§ 136, 137, it is said: "A stipulation in a contract of affreightment of live stock, requiring the owner to give notice in writing of his claim for damages to some officer of the company or its nearest station agent, before the stock is removed from the place of destination, is a reasonable stipulation, and binding on the owner, and he cannot recover on failure to give such notice, though he did not go in person, or send an agent, with the stock, as in such cases he should have sent a copy of his contract to the consignee, in order that the latter might have complied with the stipulation." In the case of *A., T. & S. F. R. Co. v. Crittenden*, 44 Pac. 1000, the Court of Appeals of Kansas say: "So far as it required the shipper to give notice in writing of his loss or injury, it is a valid, binding contract. By its terms Crittenden was compelled to give notice in writing to the company of his claim for loss or injury to such stock before said stock was removed from the place of destination on delivery, and

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before said stock was mingled with other stock. Failing to comply with the terms of this contract, he cannot recover. No notice was introduced in evidence; neither did Crittenden show that he was unable, for any reason, to produce it, and offer to prove its contents by a copy or otherwise. These provisions of the contract are just and equitable. The company is entitled to a written notice that the shipper claims damages, so as to permit the company to have a thorough investigation made of the nature of the claim and the condition of the stock before the stock is removed from its premises, and before it is mingled with other stock, so as to render its identification difficult. Where stock is shipped under written shipping contracts which provide, among other things, that, as a condition precedent to the right of the shipper to recover damages for loss or injury to said stock, he shall give notice in writing of his claim therefor, the shipper must prove such notice to have been given before he can recover." In the case of Louisville, N. A. & C. Ry. Co. v. Widman, 10 Ind. App. 92, 37 N. E. 554, it is said by the Indiana court: "In an action for injuries to a mare shipped under a bill of lading which provides that the carrier shall not be liable for loss or damage unless notified within 30 days, a complaint containing no allegation of notice or performance by the plaintiff of all conditions on his part is demurrable." In the case of Texas & Pac. R. R. Co. v. Hamm, 2 Willson's Civ. Cas. Ct. App., § 496, the court say: "In an action against a railroad company for loss of cattle shipped over its line, the contracts of shipment offered in evidence contained the following clause: 'That, for the consideration aforesaid, said second party further expressly agrees that, as a condition precedent to his right to any damages for any loss or injury to said stock during the transportation thereof, or previous to loading thereof for shipment, he will give notice in writing, verified by affidavit, of his claim therefor to some general officer of said first party or to the nearest station agent, before said stock is removed from the point of shipment or from the place of destination, and before the same shall have been removed, * * * and that a failure to fully comply with the terms of this clause shall be a complete bar to the recovery of any and all such claims.' Held, that a notice of loss in writing, verified by affidavit, was a condition precedent to plaintiff's right of action, and not only should have been alleged, but must have been proved, to entitle plaintiff to recover." We take it to be the true rule of pleading that, where there is a condition precedent to be observed before an action can be maintained or a cause of action exist, the plaintiff must show that the condition has been performed, either actually or substantially, or that he has been in some way released from that condition by the act of the opposite party, and that, in the absence of such averment, the petition does not state facts sufficient to constitute a cause of action. This doctrine seems to be supported by the case of

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Express Co. v. Harris, 51 Ind. 127; Insurance Co. v. Duke, 43 Ind. 318; and Railway Co. v. Morris, 16 Am. & Eng. R. Cas. 259. This also seems to be sustained by a provision of our own statute. Section 4326, Wilson's Rev. & Ann. St. 1903, reads as follows: "In pleading the performance of conditions precedent in a contract, it shall be sufficient to state that the party duly performed all the conditions on his part, and, if such allegations be controverted, the party pleading must establish on the trial the facts showing such performance." As we regard this provision of the bill of lading and the shipping contract as a condition precedent necessary to be performed before the maintaining of this cause of action, we think it was incumbent on the part of the plaintiff to plead a performance of that condition precedent, or a waiver of the same on the part of the defendant, and he having failed to do so, either in his petition, or reply, we think the pleading did not state a cause of action in his favor, and it was error for the court to overrule the motion for judgment on the pleadings in favor of the defendant.

The next assignment of error urged by plaintiff in error is that the court erred in overruling the demurrer of plaintiff in error to the evidence introduced by defendant in error. The main ground on which this demurrer should have been sustained was the failure of the defendant in error to introduce any proof whatever that the written notice required by the contract executed by him was given in accordance with the terms thereof. The record shows that the defendant in error admitted that no written notice was in fact given. If the action of the court in overruling this demurrer can be sustained, it must be on one of two grounds: First, that the facts and circumstances as developed in evidence show that the plaintiff substantially complied with the requirements of this contract. The record discloses that when the horses in question reached their destination, that some conversation took place between the agent of the company, and the person to whom the horses were consigned, relative to their damaged condition. The testimony of the consignee is that he informed the agent verbally that the horses were damaged, and that he would not accept the same until he heard from the consignor; that the agent of the company looked at the horses, and ordered them taken out of the car and fed and watered, the agent unlocking the car for that purpose, and that the horses were appraised by three appraisers who were selected by the agent of the company. The testimony of one of the appraisers is that they appraised the horses under the direction of the agent of the company, but that the agent was not present when said appraisal was made. The testimony of the other appraiser is that the horses were appraised under the direction, and at the instance and request of Phillips, the consignee, and that while the agent of the company was present he took no part in the appraisal. The record does not show that any notice in writing was given to the company within 30

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hours from the time the stock arrived at their destination, or at any other time prior to the commencement of this suit. The record further shows that no claim for damage was ever filed with the company, verbal or otherwise. The testimony of Van Osdall, who was with Phillips, the consignee, at the time the horses were received by him, is that he and Phillips were both strangers there, and that the three appraisers were pointed out to them by the agent Hill as competent men to make the appraisal. He testifies that no amount of damage was named by him in talking with the agent. Now the question is, was this action on the part of the consignee Phillips, a substantial compliance with the terms of the bill of lading and the shipping contract, which expressly provided that, as a condition precedent to any right to recovery, they should give notice in writing of the claim. Was there action such as would reasonably apprise the agent of the company at Hoxie, Ark., that they were making a claim against the company for damages? The only claim they made to him was that they would not receive the horses in their damaged condition until such time as they heard from Phillips, the consignor. No claim was filed for any specific amount of damages, and, as far as the record shows, no request was made of the agent to notify the company of any claim for damages, and no claim was made that the damaged condition of the horses was due to any neglect or wrongful act of the company. It might reasonably be said that these horses were damaged; and from the fact that no claim for damage was filed with the company, that the company had a right to presume that the horses were damaged before they were taken for shipment by the company, or were damaged in some way for which the company was not responsible. But even granting, for the sake of argument, that a verbal claim was made, and that evidence on such verbal claim was considered by the court, notwithstanding the silence of the pleadings on that point, we think that such a notice, under the circumstances as shown in the record in this case would be inadequate to relieve the defendant in error from the terms of the contract. When the defendant in error signed his contract and shipped his horses under it, he agreed to abide by its provisions. In the contract stipulating that written notice of the loss or damage must be made in a certain time, it does not contemplate or authorize the giving of any other kind of notice, or in any manner except in the manner provided for in the contract. There is no claim made in this case that the time in which notice was to be given was unreasonable, or that there was no agent at the destination. No reason is assigned why the notice required by the shipping contract and bill of lading could not have been given in the way and within the time expressly provided for in the contract.

Now the only other ground on which the action of the court in overruling this demurrer can be sustained is that the acts of the agent of the company at the point of destination would

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amount to a waiver of this provision of the contract. In determining this question, we must bear in mind the language of the contract. On the face of this contract, in large type, larger than the type in which the main body of the contract is printed, and so placed upon the contract as to be conspicuous, are these words: "No agent of this company has any authority to waive, modify, or amend, any of the provisions of this contract." Now we think that this provision in the contract, placed in such a conspicuous manner on the face of the contract, that the consignor with the exercise of any sort or kind of diligence must have been made aware of its existence; and we do not think that the acts of the agent of the company disclosed by this record are such as to have waived this provision of the contract so as to bind the railroad company. The Supreme Court of this territory in a recent decision, has clearly and expressly passed upon this question of waiver. It is true that the case then before the Supreme Court was the case of an insurance company, but we think there is no difference in principle between that case and the case at bar. In the case of the Deming Investment Company v. Shawnee Fire Insurance Company (decided in September, 1905), 83 Pac. 918; this court says: "Where a waiver of the stipulations and conditions contained in a policy of fire insurance is relied upon as the act and conduct of an agent of the insurance company, it must be shown that the agent had express authority from the company to make the waiver, or that the company subsequently, with knowledge of the facts, ratified the unauthorized action of the agent. An agent for a fire insurance company, whose powers are strictly defined and limited by the express terms of the contract of insurance cannot act so as to bind his company beyond the scope of his authority. A contract in writing, if its terms are free from doubt and ambiguity, must be permitted to speak for itself, and cannot by the courts, at the instance of one of the parties, be altered or contracted by parol evidence, unless in case of fraud or mutual mistake of facts, and this principle is applicable to contracts of insurance." If the rule were laid down that station agents of a railroad company, without express authority, could modify or change the plain, unambiguous terms of a written contract entered into with the company, and in variance with the express stipulations and conditions of the contract, the usefulness of such contracts and the necessity of them would be absolutely at an end. Such a doctrine would deprive the defendant company of the benefit of a contract which the courts have repeatedly declared to be reasonable, just, and valid. In the case of Sprague v. Missouri Pac. Ry. Co., reported in 8 Pac. 465, the Kansas Supreme Court say: "In an agreement between a railway company and a shipper for the transportation of horses over the railway, there was a stipulation which provided that, as a condition precedent to his right to recover damages for any loss or injury to the horses while in transit, the shipper

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would give notice in writing of his claim therefor to some officer of the said railway company, or its nearest station agent, before the horses were removed from the place of destination, or from the place of delivery to the shipper, and before such horses were mingled with other stock. Held, that the agreement is reasonable, and, when fairly made, is binding upon the parties thereto." This case was a case very similar in its facts to the case at bar. It was a case brought in the district court of Cloud county, against the Missouri Pacific Railway Company, alleging in substance that the defendant was a common carrier, and that on or about the second day of March, 1883, for a valuable consideration, the railway company undertook and agreed with the plaintiff to safely carry over its road from Atchison to Concordia certain stock, goods, wares, and merchandise; that he delivered the property mentioned for shipment, in good condition, at Atchison, but the defendant negligently and carelessly managed the car upon which the property was shipped, and by reason of such negligence, and without any fault on the part of the plaintiff, four of the horses so shipped by the plaintiff were thrown down, bruised, and injured, so that one of them died, and the others were more or less disabled, to the damage of plaintiff in the sum of \$500. The railway company denied the allegations of negligence, and the terms of the contract as stated by plaintiff, and alleged that the property had been shipped in accordance with the terms of a special agreement entered into between the plaintiff and the defendant, wherein it was stated that the company transported live stock only in accordance with certain rules and regulations, which were mentioned; and that, in consideration that the defendant company would transport for the said plaintiff the said property at the rate of \$30 per car; the same being a special rate lower than the regular rate mentioned in the freight tariff of the railway company, and other considerations, the plaintiff agreed to release the defendant from some of the responsibility and risks imposed by law upon the railway company when acting as a common carrier. The contract is set out at length in the answer, and it provided that the plaintiff should load and unload his stock at his own risk, and feed, water, and attend to the same at his own expense. He was also to accompany and care for the stock while it was being transported over the defendant's road, and for that purpose the railway company was to furnish the plaintiff free transportation over its road for one person from the point of shipment to the destination. Among the stipulations of the contract is the following: "And for the consideration before mentioned, said party of the second part further agrees that, as a condition precedent to his right to recover any damages for any loss or injury to said stock, he will give notice in writing of his claim therefor, to some officer of said party of the first part, or its nearest station agent, before said stock is removed from place of destination above mentioned, or from the

place of the delivery of the same to the said party of the second part, and before such stock is mingled with other stock."

The reply of the plaintiff was a general denial, not verified. Upon the trial, it was expressly admitted that the special contract set up in defendant's answer was signed and executed by the duly authorized agents of the parties; and it was further admitted that if the plaintiff is entitled to recover under the contract for the injuries alleged by the plaintiff, the amount of such recovery should be \$300. Testimony was then offered by the plaintiff, to the effect that the horses were in good condition when delivered to the railway company at Atchison, Kan. His brother was given a free pass over the road, and accompanied the train upon which the horses were shipped for the purpose of caring for the stock while it was being transported over the defendant's road. At several points on the route, he inspected them and found them to be still in good condition. At the station named "Palmer" some distance east of Concordia, the horses were again examined by the plaintiff's brother, and were then all right; and that after returning to the caboose, and before leaving that station he felt several jars, but was unable to state what occasioned them, or whether the horses were injured thereby. Upon arriving at Clifton, the next station, he again examined the horses and found that some of them were lying down and apparently injured. He then demanded of the conductor that the car in which the horses were shipped should be backed up to the stockyards in order that the horses might be removed from the car. This was done, when the horses were unloaded and found to be considerably bruised. He then refused to reload the horses upon the car, took possession of them, and caused them to be taken across the country to the plaintiff's farm which was not far distant. The plaintiff further testified that when the car reached Concordia, he paid the price agreed upon for the transportation of the same, but that no notice had ever been given to the conductor of that train, or to any officer or agent of the railway company, prior to the commencement of this action, that he claimed any damages for injury to his stock; that he knew the condition of the horses, and the extent of the injury to them, before they were taken to the farm, and yet he had not given any notice of any claim therefor.

When the plaintiff closed his testimony, the railway company interposed a demurrer to the evidence, which the court, after consideration, sustained. Upon this ruling the plaintiff raises and discusses several questions here; but as one of them disposes of the case, the others require no attention. If the contract of the parties is to be upheld, by which it was agreed that before the plaintiff could recover damages for any injury to his horses, he must give notice in writing of his claim therefor to some officer of the railway company, or to its nearest station agent, before the horses were removed from the place of destina-

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tion, or from the place of the delivery of the same to the plaintiff, and before they were mingled with other stock, then the demurrer to the evidence was rightly sustained, and the judgment should be affirmed. The plaintiff contends that the agreement is not binding upon him, because it is not one permitted by the laws to be made, and for the further reason that it is without consideration. As a general rule, common carriers are held liable as insurers, and are absolutely responsible for any loss to the property intrusted to them, unless such loss is occasioned by the act of God or the public enemy. It is now a well-established rule of law that this liability may be limited to a certain extent; but, to accomplish this, it must clearly appear that the shipper understood and assented to the limitation. Common carriers are not permitted, by agreement or otherwise, to exempt themselves from liability for loss occasioned by their negligence or misconduct. Such limitations are held to be against the policy of the law, and would be void. But it is no longer questioned that they may, by special agreement, stipulate for exemption from the extreme liability imposed by the common law, provided that such stipulations are just and reasonable, and do not contravene any law or a sound public policy. That the agreement in question was executed by the plaintiff is admitted, not only by the pleadings, but it was expressly agreed to by him on the trial. There is no pretense that any deceit or fraud was practiced upon him by the railway company, in obtaining his assent to the agreement. So far as appears in the testimony, it was fairly and understandingly entered into and executed. His authorized agent who accompanied the horses, and who had them in charge while passing over defendant's road, knew of this provision of the contract, and was acquainted with the condition of the stock before they were taken from the possession of the railway company. And the plaintiff, with full knowledge of this requirement, paid the freight charges agreed upon after the injury had been done without complaint, and without claiming any damages therefor, and gave no notice nor did he make any claim for damages prior to the commencement of this action. The stipulation requiring notice of any claim for damages to be given cannot be regarded as an attempt to exonerate the company from negligence or from the negligence or misfeasance of any of its servants. The company concede that such an agreement would be ineffectual for that purpose. It is to be regarded rather as a regulation for the protection of the company from fraud and imposition in the adjudgment and payment of claims for damages by giving the company a reasonable opportunity to ascertain the nature of the damage and its cause. After the property has been taken from their possession, and mingled with other property of a like kind, the difficulty of inquiring into the circumstances and character of the injury would be very greatly increased. That such a provision does not contravene public policy and that it is just and reasonable, has been expressly adjudicated by this court.

Now a comparison of the facts, or at least many of the facts in the case under consideration by the Kansas court, are similar to the facts in this case. In this case, as in that, there is no evidence of any deceit or fraud being practiced on the plaintiff by the railroad company in obtaining his assent to the agreement. That the consideration of the agreement was a reduced rate of freight, and that such agreement was entered into by the plaintiff with a full understanding that he was making an agreement to ship this stock under a contract that limited the liability of the company in case of loss or injury, and that by reason of that liability he was securing a reduced rate. This is apparent when we read the contract; for, on the face of the contract is the following language: "This application is an election on my part to avail myself of a reduced rate, by making this shipment under the following contract, limiting the liability of such carrier instead of shipping the same at a higher rate without such limitations." The case of *Goggin v. Kansas Pac. Ry. Co.*, reported in 12 Kan. 416, was an action brought to that court to review the decision of the district court sustaining a demurrer to the reply. The plaintiff in error sued defendant in error, alleging that he had sustained damages through the carelessness and negligence of the defendant in the transportation of cattle over its road. The company in its answer sets up a written contract of shipment, signed by both parties, by which the cattle were to be carried from Ogden to the state line, at special rates per car load, to be accompanied by the owner, and fed, watered, and cared for by him, in consideration of the special reduced rates. The contract stipulates that the company shall not be liable for loss by animals injuring themselves, or each other, by jumping from the cars, delay of trains, or other damage, "except such as may result from the actual negligence of the company, or its agents." There is also a stipulation that "no claim for loss or damage on live stock will be allowed, unless the same is made in writing before or at the time the stock is unloaded." (It will be noticed that this contract is almost identical with the one in the case at bar.) The reply admits the making of the contract set out in the answer, but alleges that the plaintiff signed the same under protest after the cattle were in the car; that plaintiff also verbally notified the servants of the company of the damage before the cattle were unloaded from the cars; and immediately after giving verbal notice, sought for writing materials to make out a written notice to serve on the agents of the company, but before he was able to find the materials, and write the notice, the cattle were unloaded, so that no notice was given. The reply controverts no statement in the answer. A demurrer was sustained. Then the court say: "If the defense set up in the answer is a good one, then the reply does not avoid it. It is no excuse for not performing a contract that it was signed under protest. The plaintiff had his option to have his cattle transported at the usual rates, and hold the company responsible as a common carrier,

or at special rates on lower terms, and with less responsibility on the part of the carrier. He chose the latter, and cannot now avoid his contract by saying he signed under protest. Neither is the reason given for not giving the written notice sufficient. If the contract stipulation as to written notice is valid, then the inability to procure writing materials at the instant of unloading of the cattle is no excuse for not giving the notice for more than a year afterwards. If the stipulation is not valid, then no notice was necessary. This presents the real question in the case. The stipulation as to notice contravenes no statute. The parties were competent to make the contract and did make it, and it must be held good unless it is contrary to public policy. How far a common carrier may limit his responsibility by special contract is not involved in this case, for the pleadings do not raise that issue. It is undoubtedly settled that the common carrier may relieve himself from the strict liability imposed on him by the common law, by a special contract; but it seems that he cannot relieve himself from liability for his own negligence. The contract pleaded does not pretend to relieve the defendant for the consequences of his own negligence. It only stipulates that the shipper shall on his part perform certain duties. The reasons for this clause are set out in the answer, as follows: The defendant was engaged in transporting great numbers of cattle over its road, which were shipped further to market, or so commingled with other stock that it would be impossible to distinguish one car load from another, unless attention was called to them immediately; and the object of the notice was to relieve the company from false and fictitious claims, by having an inspection before they were removed or mingled with other cattle, and proper damages ascertained and allowed—of which reasons the plaintiff had full knowledge, and still chose to ship at reduced special rates. The reasons are cogent, and we are unable to see how it contravenes public policy that a special contract at reduced rates should stipulate that reasonable notice of injury should be given. We are unable to perceive any stronger objection to such a contract than exists in the case of any other insurer of goods to which the carrier's obligation is analogous, and which depends altogether upon the contract of the parties. *New Jersey Steam Nav. Co. v. Merchants Bank*, 6 How. 382, 12 L. Ed. 465. But such a contract should be reasonable, and not such as to be a snare or fraud upon the public. What is a reasonable time must depend on many circumstances. In this case the plaintiff accompanied the cattle, feeding and superintending them; and, by his reply, admits that he knew of the injury at the time of the unloading, and could have given the notice immediately had he chosen to do so. Unless the notice was given immediately, it would be of no value to the defendant. Under these circumstances, we cannot hold that the time when the notice was to be given was unreasonable. Of course, it is not understood by the phrase, 'before or at the time the stock is un-

loaded' that it must be the identical moment, but so immediately that the object sought by the notice can be attained. Now would such a notice be reasonable in the case of an ordinary shipper who did not accompany and superintend his stock, nor would it probably prevent a recovery for injuries sustained which could not readily be seen and actually should not be discovered till the time for giving the notice had expired. Yet, in such a case, good faith would require notice so soon as the injury was known. So far as we have been able to see, the authorities are 'in accordance with the views presented.'

Now the strong resemblance between this case and the case at bar will be noticed. The contracts were almost identical. The liability is the same. The damage was known to the consignee who was the agent of the consignor at the time the stock arrived at its destination. The claim is made in the case at bar that verbal notice was given. The record shows that no other or different notice was ever given the company prior to the commencement of this suit, and it seems to us that it falls fairly within the case under consideration by the Kansas Supreme Court. And that court expressly says that the giving of the verbal notice was not sufficient, because they say, if the contract and stipulation as to written notice is valid, then the inability to procure writing materials at the instant of unloading the cattle is no excuse for not giving notice for more than a year afterwards; and in this case, no notice was given at the time that the stock arrived at the destination, and were found to be injured, by the agent of the consignor, nor at any time prior to the commencement of this suit. In the case of *Express Co. v. Caldwell*, reported in 21 Wall. 264, 22 L. Ed. 556, the Supreme Court of the United States say, on page 267 of 21 Wall. (22 L. Ed. 556) of the opinion: "Hence, as we have said, it is now the settled law that the responsibility of a common carrier may be limited by an express agreement with his employer at the time of his accepting goods for transportation, providing the limitation be such as the law can recognize as reasonable, and not inconsistent, with sound public policy." In the case of *York Company v. Central Railroad Company*, 3 Wall. 107, 18 L. Ed. 170, the court says: "The common-law liability of a common carrier may be limited and qualified by special contract with the owner, provided such special contract do not attempt to cover losses by negligence or misconduct." In the case of *Railroad Company v. Lockwood*, 17 Wall. 357, 21 L. Ed. 627, the court says: "A common carrier is always responsible for his own negligence, no matter what his stipulations may be. But an agreement that in case of failure by the carrier to deliver the goods, a claim shall be made by the bailor, or by the consignee, within a specified period, if that period be a reasonable one, is altogether of a different character. It contravenes no policy. It excuses no negligence. It is perfectly consistent with holding the carrier to the fullest measure of good faith, of diligence and of capacity,

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which the strictest rules of the common law ever required. And it is intrinsically just as applied to the present case. The defendants are an express company. We cannot close our eyes to the nature of their business. They carry small parcels, easily lost or mislaid and not easily traced. They carry them in great numbers. Express companies are modern conveniences, and notoriously they are very largely employed. They may carry, they often do carry hundreds, even thousands of packages, daily. If one is lost, or alleged to be lost, the difficulty of tracing it is increased by the fact that so many are carried, and it becomes greater the longer the search is delayed. If a bailor may delay giving notice to them of a loss, or making a claim indefinitely, they may not be able to trace the parcels bailed, and to recover them, if accidentally missent, or if they have in fact been properly delivered. With the bailor, the bailment is a single transaction, of which he has full knowledge; with the bailee, it is one of a multitude. There is no hardship in requiring the bailor to give notice of the loss if any, or make a claim for compensation within a reasonable time after he has delivered the parcel to the carrier. There is great hardship in requiring the carrier to account for the parcel long after that time, when he has had no notice of any failure of duty on his part, and when the lapse of time has made it difficult, if not impossible to ascertain the actual facts. For these reasons, such limitations have been held valid in similar contracts, even when they seem to be less reasonable than in the contracts of common carriers. In *Missouri Pac. Ry. v. Scott*, 2 Willson's Civ. Cas. Ct. App. § 324, the court says: "A shipper must allege and prove giving of notice as a condition precedent. Where there was a stipulation in the contract of shipment between plaintiff and defendant railroad company that, as a condition precedent to plaintiff's right to recover any damage for any loss or injury to stock, he would give notice in writing of his claim therefor to some officer of the company or its nearest station agent before removing said stock from the place of destination, a verbal notice given to the superintendent of the stockyard and the conductor of the train of his claim for damage is not sufficient. Where a shipping contract provides that the shipper will give written notice of any injury to stock carried thereunder, a verbal notice is not sufficient to entitle plaintiff to recover."

Now, in the light of these decisions, we think that the demurrer interposed by the defendant at the conclusion of the plaintiff's evidence should have been sustained. To hold that the facts as developed in this record constitute either a substantial compliance with the terms of the contract, or a waiver thereof on the part of the company, would be to allow a party to disregard a substantial and material part of a valid binding contract without the consent of the other party. It is the duty of the court to construe the contract as made by the parties, and not to attempt to make contracts for them. In this case, it is apparent

from the record that this contract was fairly and understandingly entered into by and between the parties. That it was done for the purpose of securing a reduced rate for the transportation of the stock, and contains unambiguous, clear, and concise agreements on the part of the shipper, among which was, that he would, within 30 hours from the time of the arrival of the stock at its destination, give notice in writing to the company, or its agent, of any claim he might have for any damages, and he expressly provides that this shall be a condition precedent to his right to recover. There is no claim made that this was a provision that could not be complied with, neither is any claim made that any attempt was made to comply with this condition of the contract according to the terms thereof. The condition of the stock at its destination was known to the consignee. He had the opportunity and the facilities of giving the notice required by the contract, and no excuse is offered by him why he did not at that time comply with the terms of his own contract; and we cannot hold that in the face of the plain, unmistakable terms of this contract that the party can bring suit and recover for damages against the company without any written notice of any kind or character, or without making any claim upon the company for damages prior to the bringing of this suit. The evidence of the plaintiff expressly admits the execution of this contract and the shipment of the horses in question under it. He also admits that no written claim for damages was made as required by the contract, and in that evidence no excuse is offered why such claim should not have been made in the manner, and within the time, as provided thereon. The evidence does not show that any verbal claim for any specific amount of damages, or that a claim for damages which in any way itemized the kind and character of damages, was made by the defendant in error within the time provided by the contract, or at any time prior to the commencement of this suit.

Now we are unable to see how there is anything unjust, inequitable, or unfair in this provision of the contract. These parties were parties of mature age, and experience. They were capable of making a contract. As such, they entered into a contract which was clear and unequivocal in its terms. By the very terms of that contract, it was expressly stipulated that this plaintiff would bring no action for damages against the company, unless he first notified the company, or its agent, in writing of his claim for damages. Now if this contract was between two individuals, we are unable to see how a court could possibly hold that such an agreement was not a condition precedent to be performed by the injured party prior to his bringing any suit thereon, and we can see no difference in principle whether the contract is between a railroad company on one side, and an individual on the other, than if it were between two individuals. If the contract is a hardship, it is a hardship which the plaintiff has put upon himself, and he must abide the consequences. He

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has expressly agreed that, before he shall commence any suit against the company for damages, he would file his claim for damages in writing, which he has not done; for that reason, we think the demurrer of the defendant should have been sustained. A reversal of this case is asked for on several other grounds, among which is the fact that the court overruled the motion of the defendant for judgment on the special findings, notwithstanding the general verdict. Also, that the court erred in giving instructions to the jury; but as we think the grounds already discussed are sufficient for a reversal of this case, it is not necessary to enter into a discussion of the other points raised.

For the reasons herein expressed, this case is reversed, and remanded to the probate court of Oklahoma county, with directions to that court to sustain the motion of the defendant for a judgment on the pleadings, at the costs of the defendant in error.

All the Justices concurring, except PANCOAST, J.

YAZOO & M. V. R. Co. v. BLUM.

(Supreme Court of Mississippi, Dec. 3, 1906.)

[42 So. Rep. 282.]

Carriers—Carriage of Goods—Delay in Delivery—Excuse.*—Where a carrier's failure to transport cotton with reasonable dispatch was caused by an excessive crop, it was not liable for the delay, where it took extraordinary steps to handle the cotton, and the shipper knew at the time it offered the cotton for shipment that, on account of the heavy traffic and large demand for cars, it could not be transported with the usual rapidity.

Appeal from Circuit Court, Washington County; A. McC. Kimbrough, Judge.

Action by Y. M. Blum against the Yazoo & Mississippi Valley Railroad Company. From a judgment sustaining plaintiff's demurrer to defendant's plea, defendant appeals. Reversed and remanded.

*For the authorities in this series on the question, what delays in the transportation of freight will, and will not, render the carrier liable, see foot-notes appended to *General Fire Ext. Co. v. Carolina & N. W. Ry. Co. (N. Car.)*, 19 R. R. R. 336, 42 Am. & Eng. R. Cas., N. S., 336; foot-notes appended to *Mauldin v. Seaboard Air Line Ry. (S. Car.)*, 19 R. R. R. 76, 42 Am. & Eng. R. Cas., N. S., 76; *Alabama Great So. R. Co. v. Quarles & Couturie (Ala.)*, 19 R. R. R. 69, 42 Am. & Eng. R. Cas., N. S., 69.

For the authorities in this series on the subject of the duty of a railroad as a common carrier, to furnish cars for the transportation of freight, see foot-notes appended to *Agee & Co. v. Louisville & N. R. Co. (Ala.)*, 18 R. R. R. 129, 41 Am. & Eng. R. Cas., N. S., 129; *Central of Georgia Ry. Co. v. Augusta Brok. Co. (Ga.)*, 16 R. R. R. 634, 39 Am. & Eng. R. Cas., N. S., 634; *State v. Chicago, etc., R. Co. (Neb.)*, 14 R. R. R. 402, 37 Am. & Eng. R. Cas., N. S., 402.

The cause of action in this case is practically the same as in *Yazoo Railroad Company v. Blum* (Miss.) 40 South. 748, though an entirely different action. The declaration alleges that the railroad company, by accepting the cotton for shipment and issuing its bills of lading therefor, agreed and became bound to transport it to its destination within a reasonable time; that it failed to do so; and that by reason of the delay in the transportation the plaintiff suffered a loss due to decline in the market, for which suit is brought. The railroad company filed a special plea, which is set out in substance in the opinion; the special difference between its special plea here and in the case in 40 South. 748, being the averment that the railroad company took unusual and extraordinary steps to transport the cotton promptly, and that plaintiff knew at the time he offered the cotton for shipment that, on account of the heavy traffic and large demand for cars, it could not be transported with the usual rapidity. Plaintiff demurred on the following grounds: "(1) It is not alleged in said special plea that the plaintiff was notified by the defendant at the time of the various shipments of the cotton, or at any time, of the alleged lack of facility to transport said cotton within a reasonable time; nor is it alleged that plaintiff knew of the said alleged lack of facility and assented thereto, and it appears that defendant received said cotton without notifying said plaintiff of said alleged lack of facilities. (2) Said defendant accepted said cotton for shipment, knowing its inability to ship within a reasonable time, and it is not alleged that plaintiff assented thereto." The demurrer was sustained, and on the trial on the general issue plaintiff introduced proof substantiating the allegations of his declaration and of his demurrer to the special plea of defendant. The defendant offered testimony to sustain the allegations of its special plea, the court declined to permit the introduction of such evidence, the jury returned a verdict for plaintiff, and defendant appeals.

C. N. Burch and Mayes & Longstreet, for appellant.
Shields & Boddie, for appellee.

MAYES, J. Blum sued the Yazoo & Mississippi Valley Railroad Company for unreasonable delay in the shipment of certain cotton delivered to the company to be transported from certain stations along its line to Greenville. To the declaration the railroad company pleaded the general issue, and filed a notice with same in which it is offered to show that the delay in this shipment was caused, not by reason of any lack of equipment to handle its ordinary traffic at all seasons of the year, but because there was an excessive crop, greater than all estimates made by either the railroad or experts most familiar with crop conditions for that year; that from an estimated crop of a little over 11,000,000, the crop, in reality, was something over 13,000,000, and the company did not and could not foresee or anticipate any such record-breaking crop, and, if it had been able to do so, it

would not have been able to provide necessary equipment to move this enormous crop of cotton with greater promptness than it was handled by the defendant at that time; that it exhausted all means to procure additional equipment, and provided a greater number of cars for the movement of this crop than it had provided in any previous year, but, notwithstanding this fact, on account of the unusually heavy crop and the great demands made upon it along this part of its line and elsewhere, it was unable to handle and move the cotton tendered by appellee with greater dispatch than it did; that in order to handle this cotton it took unusual and extraordinary steps to handle it promptly, and transport it to market, and rush back cars when emptied without waiting for them to be reloaded, so that the number of empty cars handled by them during the months exceeded the number of empty cars handled by them in any previous year; and that appellee knew, at the time he offered the cotton for shipment, that a large amount of cotton was being offered to the defendants at the points from which appellee's cotton was shipped, and was informed that this was true all along the line, and knew that there was a great demand for cars, and that the cotton was not being transported with the rapidity with which it was usually transported. It further said, to require it to provide and retain an equipment of cars and labor to move the crop for 1904-05 being offered on its lines during the months of October, November, and December, would have required it to purchase and keep an equipment amounting to more than one-third of any equipment required or needed to move the freight under ordinary conditions during any month of any season prior to the date cotton was shipped. The court decline to admit the proof offered in the special notice, and a verdict was returned in favor of Blum for the sum of \$1,348, and the railroad company appealed.

It was error in the court to exclude the proof offered under notice filed with the general issue. If appellant had made the proof offered under this notice, it would have furnished a complete defense to this suit. In the case of *Y. & M. V. R. R. Co. v. Blum* (Miss.) 40 South. 748, the facts show that the company, at that time, was only provided with such engines, cars, and other equipment necessary for handling its freight as was sufficient for eight or nine months of the year, and that during the marketing season of three or four months the rush of business required more cars and equipment than was necessary for the proper handling of the ordinary business of the company, and the company had failed to provide the cars, and the facts do not show that Blum knew or was informed of the conditions existing when he offered the cotton for shipment, and the court said: "The pleas admit that the delay in the handling and transportation of appellee's cotton, and the damages sustained, resulted from defendant's not being provided with sufficient equipment and facilities for the handling of this cotton with greater expedition than was used in handling it"—and further says: "It was also mani-

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fest, from the allegations of the special pleas, that appellant does not possess the engines, cars, and other equipment necessary for the handling of freight over its line, and ample and sufficient for the transportation and dispatch of all business ordinarily offered at all time," and for this reason (that is to say, because of the failure of the company to furnish sufficient equipment and facilities for handling its shipment under ordinary conditions at all times, and because there was no notice to Blum) the court held that the company had not fulfilled its duty, and therefore was liable. But in this case the proof offered under the notice filed meets and overcomes the very point in which the court held in the case in 40 South. 748, that the company should be liable. A railroad company, as common carrier, must furnish such facilities for transportation as will meet the ordinary demands of the public, but is not bound to anticipate or provide in advance for an unusual influx of freight. *Galena, etc., R. R. Co. v. Roe*, 68 Am. Dec. 574; *Ballentine v. N. Missouri R. R. Co.*, 93 Am. Dec. 315; *Thayer et al. v. Burchard*, 99 Mass. 521; *Helliwell et al. v. Grand Ry. (C. C.)* 7 Fed. 68; *Faulkner et al. v. Southern Pacific Ry.*, 51 Mo. 311; *Wibert v. N. Y. & Erie Railway*, 19 Barb. (N. Y.) 36, 51.

Let the cause be reversed and remanded.

CORNELIUS v. ATCHISON, T. & S. F. RY. CO.

(Supreme Court of Kansas, Nov. 10, 1906.)

[87 Pac. Rep. 751.]

Carriers—Live Stock Shipment—Action for Damages.—Where the plaintiff asks damages from a railroad company for negligence in carrying and delivering cattle shipped over its line, alleging that it had orally agreed to carry and deliver the cattle upon certain conditions, and the railroad company admits the receipt and shipment of the cattle, but alleges that they were carried under a written contract, the conditions of which had not been complied with by plaintiff, and proof is offered on the one part that the contract of shipment was oral, and upon the other that it was written, and which tended to show actionable negligence under either theory, held, that the plaintiff can recover the damages sustained as measured by the agreement established by the evidence.

Same—Delay—Notice of Claim.*—A provision in a live stock shipping contract that notice in writing of the shipper's claim for damages shall be a condition precedent to a recovery for any loss or injury to stock during transportation does not cover damages such as the loss of market or other losses occasioned by the carrier's negligent delay, and which arise after transportation has ended.

Evidence—Competency.—In a controversy as to the making of an

*For the authorities in this series on the subject of notice of claims against railroads, see foot-notes appended to *Mumford v. Chicago, etc., Ry. Co. (Iowa)*, 20 R. R. R. 431, 43 Am. & Eng. R. Cas., N. S. 431; *Reynolds v. Great Northern Ry. Co. (Wash.)*, 20 R. R. R. 70, 43 Am. & Eng. R. Cas., N. S. 70.

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agreement one of the parties to it may not testify as to what he had in mind in the preliminary negotiations, nor state his unexpressed intent in such negotiations.

(Syllabus by the Court.)

Error from District Court, Butler County; G. P. Aikman, Judge.

Action by B. H. Cornelius against the Atchison, Topeka & Santa Fe Railway Company. Judgment for defendant, and plaintiff brings error. Reversed.

T. A. Kramer and *N. A. Yeager*, for plaintiff in error.

W. R. Smith, *O. J. Wood*, and *A. A. Scott*, for defendant in error.

JOHNSTON, C. J. B. H. Cornelius brought an action against the Atchison, Topeka & Santa Fe Railway Company to recover damages alleged to have been sustained by the failure of the company to deliver cattle shipped over its line from Augusta, Kan., to Chicago, Ill., in accordance with the agreement of the parties and its duty in the premises. It was alleged that, on September 5, 1903, 12 carloads of fat export cattle were shipped from Augusta to Chicago over the defendant's line upon an oral contract that they were to be delivered at Chicago on the morning of the 7th of September, 1903, in time for the market of that day, but that the cattle were negligently and unskillfully handled and delayed at various stations on the line and failed to reach Chicago until the afternoon of September 7th, and after the market of that day had been closed. The loss sustained by reason of the negligent delay was a decline in the market subsequent to the morning of the day when the cattle should have been delivered, shrinkage of the cattle while being kept until they could be marketed on September 9th, and cost of keeping them during that time. It was alleged that some of the cars were negligently billed and delivered to the wrong parties by the company by which an additional loss resulted. The railway company in its answer admitted the receipt and transportation of the cattle over its line, but averred that they were shipped under written contracts which contained a provision "that live stock covered by this contract is not to be transported within any specific time, nor delivered at destination at any particular hour, nor in season for any particular market." In respect to loss or claims for damage by shippers, the contract contained a stipulation that "as a condition precedent to his right to recover any damage for any loss or injury to said stock during the transportation thereof, or at any place or places where the same may be loaded or unloaded for any purpose on the company's road, or previous to loading thereof for shipment, the shipper or his agent in charge of the stock will give notice in writing of his claim thereof to some officer of said company, or to the nearest station agent, or, if delivered to consignee at a point beyond the company's road, to the nearest station agent of the last carrier making such de-

livery, before such stock shall have been removed from the place of destination above mentioned, or from the place of delivery of the same to the consignee, and before said stock shall have been slaughtered or intermingled with other stock, and will not move such stock from said station or stockyards until the expiration of three hours after giving such notice; and a failure to comply in every respect with the terms of this clause shall be a complete bar to any recovery of any and all such damages." It was alleged by the defendant that no notice of loss was given to the company as required by the quoted provision. Aside from a general denial the answer contained a specific denial that any oral contract was made, or that its agent had any authority to make one. Plaintiff replied, admitting the signing of the written contracts, but alleged that they were signed after the cattle had been placed in charge of the railway company, when the train was about to start, and there was no opportunity to read the contracts. He also alleged that he was coerced into signing them by the declaration of the agent that the cattle would not be permitted to go on the train unless the papers then presented were signed. It appears that Cornelius had negotiated with the local agent of the company in regard to obtaining a special train to start from Augusta on Saturday, and which would arrive with the cattle at Chicago early Monday morning, but the agent declined to promise such a train without consulting his superior officers at headquarters. He agreed to write to Topeka and ascertain whether such a train could be had, and in a few days reported to Cornelius that he had heard from Topeka, and that the train requested would be furnished. It appears, too, that the cattle were export cattle for which there was a market on Mondays, but none on the following day, and that cattle not sold on Monday were necessarily kept over until the Wednesday market, and this was the reason given by Cornelius to the company for prompt shipment. There was considerable delay in the transportation of the cattle, and as a result they did not arrive in Chicago for Monday's market. There was a decline in the market and a corresponding loss to the owner of the cattle, and in addition to the expense of holding the cattle until the sale could be effected. Testimony was offered in behalf of the defendant, tending to show that no oral contract was made, but that the cattle were shipped under certain written contracts which were produced in evidence. The trial court submitted to the jury the question whether the cattle were shipped under the oral contract alleged by the plaintiff, or under written ones set out by the defendant, and the jury found generally in favor of the railway company.

Complaint is made of the instructions of the court, and of rulings upon testimony. In its charge to the jury the court instructed that, if the plaintiff sustained his averment that the cattle were shipped under the oral contract, he could recover for the loss resulting from the negligence of the company with-

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out regard to whether any notice was given to the company by the plaintiff of his claim for damages. The court then said to the jury: "You are instructed that, if the plaintiff in this case fails to prove by the preponderance of the evidence an oral contract between him and the defendant, in substance, such as is alleged in the petition, then, in that case, the plaintiff cannot recover in this action, and your verdict must be for the defendant. * * * You are instructed that, if you find from the evidence that the written contracts in evidence were signed by plaintiff, or his agent, after the oral contract claimed by plaintiff was made, said written contracts became thereby the only contracts between the parties, and said oral contract claimed by plaintiff, if any such existed, became merged in said written contract, and plaintiff cannot recover in this action, unless you also find from the evidence that the signature of plaintiff, and his agents, was obtained to said written contracts by fraud or coercion." The peremptory direction to find for the defendants, if it was found that the written contracts were the controlling ones, cannot be upheld. Obviously, it was based on the failure of the plaintiff to give written notice of his claim for damages within the time specified in the written contracts. The plaintiff could not be denied a recovery because it was found that the damages must be measured by written contracts rather than a prior oral one. While the plaintiff alleged an oral contract, the pleadings of the parties when construed together were sufficient to warrant a recovery under whatever contract was found to have been actually made. The gist of the action was the negligence and wrong doing of the defendant, resulting in injury to the plaintiff. The agreements of the parties are important in fixing the duties and liabilities of the railroad company, but, as the defendant admitted receiving and shipping the cattle and itself pleaded the terms of the contracts under which the shipments were made, it cannot urge that a recovery cannot be had for its negligence when measured by the agreements actually made, whether they be written or oral. It may, and did, urge that the written contracts are the binding ones, and that under them the plaintiff is barred from recovering damages, because he failed to comply with reasonable requirements included in those contracts.

The first stipulation relied on as precluding a recovery is that the cattle were not to be delivered within any specific time, at any particular hour, nor in season for any particular market. While, under this provision, the arrival of the cattle is not required at any fixed time, nor for any particular market, the company has not contracted, and, in fact, could not contract, against its own ordinary negligence. While limitations upon its common-law liability are permitted, it is still required to transport the cattle with due diligence and care, and it must still be liable for losses resulting from its ordinary negligence. There was a limitation in the written contracts which precluded a

recovery for loss or injury to the cattle during transportation unless the shipper, or his agent in charge of the cattle, gave notice in writing of the claim to some officer or agent of the company before they were removed from the destination or place of delivery, or have been slaughtered or intermingled with other stock. This limitation has been considered and sustained *Goggins v. K. P. Ry. Co.*, 12 Kan. 416; *Sprague v. Missouri Pacific Ry. Co.*, 34 Kan. 347, 8 Pac. 465; *W. & W. Railroad Co. v. Koch*, 47 Kan. 753, 28 Pac. 1013; *Kalina v. Railroad Co.*, 69 Kan. 172, 76 Pac. 438. The provision, however, only covers loss or injury to the cattle during the transportation, and manifestly would cover any shrinkage of the cattle during transportation. It does not cover the loss of market, or injury arising from depreciation in the market. In *Railway Co. v. Poole* (Kan.) 87 Pac. 465, the provision in question was interpreted, and it was held that it did not fairly cover the loss of a market. It was said: "Here the claim specified in the contract, of which notice is to be given, is confined to loss or injury to stock during transportation, and the notice required to be given before the removal of the cattle from the place of the delivery or destination, and before they were slaughtered or intermingled with other stock. A loss of market differs distinctly from a loss or injury to the cattle. Depreciation in the price or the loss of a market is not fairly embraced within the terms of the contract requiring notice of loss or injury to the cattle during transportation." See, also, *Kramer & Co. v. Railway Co.*, 101 Iowa, 178, 70 N. W. 119. The case of *Kalina v. Railway Co.*, supra, is cited as an authority that the lack of notice bars a recovery of damages, but the contract involved in that case made the claiming of damages within a fixed time a condition precedent to a recovery of any and all kinds of damage. *Railway Co. v. Means* (Kan.) 80 Pac. 604, is also cited for the proposition that the giving of notice is essential to a recovery. That case followed the *Kalina* Case, in deciding that notice of the claim of damages was a condition precedent to a recovery, but no attention was given to the particular question involved here. It is said that the contract in that case was similar to the one in question here, and that some of the damages claimed belonged in the same class with those involved in this case. However that may have been, it is manifest that the distinction between loss and injury to the cattle during transportation and loss of a market or losses arising after delivery and resulting from the negligence of the railway company was not considered or determined. It cannot, therefore, be regarded as an authority that loss or injury to the cattle during transportation is identical with loss of a market or other losses arising after transportation has ended.

If it turns out that the written contract is binding upon plaintiff, he would still be entitled to recover damages other than for losses or injury during the transportation, and which were the result of the defendant's negligence. The preemptory direction

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of the court, cutting out any recovery under the written contract, was therefore error. Testimony was offered tending to show losses for which a recovery may be had without giving the notice specified in the contract, and the jury should have been permitted to determine what, if any, damages should have been awarded.

Proof was offered by the plaintiff tending to show that the shipment was made under an oral contract. When Nevins, the station agent of the company, testified, he was asked if, in the conversations he had had with plaintiff in regard to shipping the cattle, he had ever had in mind or understood that he was making an oral contract, and, over objections, he stated that he had not. To allow him to give his unexpressed intent was manifest error, and the importance of the error was increased by an instruction to the effect that, before plaintiff could recover on the oral contract, the minds of the agent of the company and of the plaintiff must have met and agreed on the terms and conditions.

There is complaint of the sixth instruction, and, as printed in the record, it appears to be ambiguous and faulty, but that defect can be corrected and cleared up in a future trial.

For the errors pointed out, the judgment must be reversed, and the cause remanded for a new trial. All the Justices concurring.

MISSOURI, K. & T. RY. CO. v. FRY.

(Supreme Court of Kansas, Nov. 10, 1906.)

[87 Pac. Rep. 754.]

Carriers—Live Stock Shipments—Delay in Transportation.*—A live stock shipping contract contained a stipulation that, as a condition precedent to his right to recover for any loss or injury to the cattle, resulting from the carrier's negligence, including delays, the shipper should give notice in writing before the cattle were removed from pens at destination. Held, that the words "including delays" cannot be regarded as having reference to a loss resulting from a decline in the market occasioned by the carrier's negligent delay in transportation.

Same—Measure of Damages.—In an action against a carrier to recover for loss from a decline in the market price occasioned by negligent delays in the transportation of cattle, the measure of damages is the loss sustained by the decline of the market where the cattle were delivered, and an instruction that the jury should consider the price the cattle subsequently sold for at another market, to which they were reshipped over another road, and the decline at that market on a different day is erroneous.

(Syllabus by the Court.)

Error from District Court, Woodson County; Oscar Foust, Judge.

Action by J. H. Fry against the Missouri, Kansas & Texas

*See preceding case, and foot-note.

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Railway Company. Judgment for plaintiff. Defendant brings error. Reversed.

In an action against the Missouri, Kansas & Texas Railway Company, J. H. Fry sought to recover damages for an alleged delay in the shipment of 107 head of cattle from Neosho Falls to Kansas City, Mo. The cattle were loaded in five cars, two of which contained 44 head consigned to a commission company at Chicago, with the privilege of the Kansas City market. The remaining cattle were consigned to the same commission company at Kansas City. The contracts for the transportation of the cattle were in writing, copies of which were attached to and made a part of the petition. Across the face of the contract covering the 44 head consigned to Chicago were stamped the words "with privilege of Kansas City market," and it was alleged that by this provision the shipper had the right, upon arriving at Kansas City, to elect whether to unload there and dispose of the cattle or have them carried by the railway company at Chicago at the through tariff rate from Neosho Falls, which was 28½ cents per 100; that, in the event he elected to sell the cattle at Kansas City, he was to pay only the tariff rate from Neosho Falls to Kansas City, which was 11 cents. The cattle were shipped from Neosho Falls on the 26th day of January, 1904, and it was alleged that they should have arrived in Kansas City on the morning of the 27th in time for that day's market; that, by reason of the negligence of the railway company, the cattle failed to reach Kansas City until the afternoon of the 27th, too late for the market of that day, and too late for the 44 head of cattle to reach Chicago in time for the market there on the 28th; that, on the arrival of the cattle at Kansas City, the market there had suffered a decline which continued on the 28th; and that plaintiff, in order to realize the highest market price on all the cattle, reshipped the 107 head on the evening of the 27th to Chicago over another road, and failing to reach Chicago in time for the market of the 28th, was obliged to hold the cattle until the 29th when he sold all at a loss occasioned by the decline in the Chicago market. Damages were also claimed by reason of the additional freight on the 44 head of cattle consigned to Chicago. Plaintiff claimed that he paid the sum of the rates (11 cents to defendant and 20 cents to the other railway company) and asked damages for the difference between the through tariff rate and the sum paid, which it was agreed amounted to \$12.32. The answer was a general denial. The only evidence on the trial that was offered by plaintiff, from which it appears that the cattle did not arrive at Kansas City until afternoon of the 27th, when the market of that day had closed, and that they should, in the ordinary course, have arrived there in the morning; that this delay was occasioned by the negligence of the railway company; that plaintiff caused all the cattle to be unloaded and fed at Kansas City, and, late on the afternoon of the same day, upon advice of his commission

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company, reshipped all the cattle to Chicago over another road, paying therefor the 20-cent rate from Kansas City to Chicago. His commission company had already paid to defendant company, when the cattle were delivered at Kansas City, the 11-cent rate from Neosho Falls. It was admitted that no notice was given defendant company of any election to have the 44 head of cattle carried to Chicago, or any demand that defendant company should forward them. There was evidence showing a decline in the market at Kansas City on the 28th below the price of the 27th. Some witnesses estimated this decline at from 15 to 20 cents, others at from 25 to 30 cents, per 100. There was evidence also showing a decline in the Chicago market between the 28th, when it was claimed that, but for the delay at Kansas City, the 44 head should have arrived there, and the 29th when all the cattle were sold. The jury returned a verdict in favor of plaintiff for \$333.32. In answer to special questions they stated that they allowed for damages occasioned by decline in the market \$321 which was arrived at by allowing 25 cents per 100 pounds for decline in price, based upon an average weight of 1,200 pounds per head for the 107 cattle. They also allowed for additional freight paid on the 44 head the sum of \$12.32. From this judgment plaintiff in error appeals.

John Madden, W. W. Brown, and Lamb & Hogueland, for plaintiff in error.

G. R. Stephenson, for defendant in error.

PORTER, J. (after stating the facts). Three assignments of error are urged: First, overruling the demurrer to plaintiff's evidence; second, error in instructions; third, denying the motion for a new trial.

The first error, the overruling of the demurrer to the evidence, is based wholly upon the contention that the written contracts, which were made parts of the petition, contained certain provisions which, under the admitted facts and evidence, prevented a recovery by plaintiff. The contracts are what are known as "special live stock contracts" and contained the following provision: "The shipper further expressly agrees that, as a condition precedent to his right to recover any damages for any loss or injury to said cattle resulting from carrier's negligence as aforesaid, including delays, he will give notice in writing to the conductor in charge of the train or the nearest station or freight agent of the carrier on whose line the injuries occur before said cars leave that carrier's line or before the cattle are mingled with other cattle or removed from pens at destination. In his notice he shall state place and nature of the injuries, to the end that they may be fully and fairly investigated, and said shipper shall, within 30 days after the happening of the injuries complained of, file with some freight or station agent of the carrier, on whose line the injuries occurred, his claim therefor, giving the amount. Shipper's failure to

comply with the requirements of this section shall absolutely defeat and bar any cause of action for any injuries resulting to said cattle as aforesaid." Another provision was as follows: "No agent of this company has any authority to waive, modify, or amend any of the provisions of this contract, or to agree to ship said cars by any particular train, or to reach any particular market * * * on any particular day, which the carrier hereby expressly declines to do." The second provision quoted may be disposed of in a few words. There was evidence that the delay in transporting the cattle was caused by the negligence of defendant. That the railway company could not, by the terms of this provision, limit its liability for damages caused by its own negligence is so obvious as not to need the citation of authorities. It was admitted that no written notice of loss was given under the first provision quoted, and plaintiff in error contends that the giving of this notice was a condition precedent to the right to maintain the action. Indeed, this is the main contention here. Aside from a claim of error in certain instructions which will be considered hereafter, it is upon this that a reversal is sought. This question has been settled adversely to the contention of plaintiff in error, and is no longer an open one. *Railway Co. v. Poole* (Kan.) 87 Pac. 465, and *Cornelius v. A., T. & S. F. Ry. Co.* (just decided) 87 Pac. 751. The only apparent material difference in the contract in those cases and the one here is that this contains the words "including delays," so that it reads, "For any loss or injury to said cattle resulting from carrier's negligence as aforesaid, *including delays*, he will give notice," etc., and the further difference that in the two cases, *supra*, the damage is for any loss or injury to said stock "*during the transportation thereof*," while in the one under consideration, instead of the words in italics, it reads, "any loss or injury to said cattle *resulting from carrier's negligence as aforesaid*." It is, however, so apparent from the whole contract that, when loss or injury is mentioned, reference is had to the physical condition of the cattle as affected by something which might occur during transportation that the absence of the phrase is of no consequence. It is not clear just what is meant by the words "including delays," unless they are used in reference to the physical condition of the stock as affected by delays. The purpose cannot be said with reason to provide for notice of a loss resulting from a decline in the market, for it would be manifestly unreasonable to require the shipper to give notice of something which might or might not happen, depending upon a variety of circumstances and conditions which he could not judge of until after his interests might require the removal of the stock from the pens at destination. He might see fit, before the market of the next day, to ship his stock back home, or to some other market, and yet not lose his right to maintain an action for any damage caused by the company's negligent delay, resulting from a decline in the market. The

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contract provides that the notice shall state the place and nature of the injuries "to the end that they may be fully and fairly investigated." The reasons for such notice are obvious when applied to injuries received by cattle in transportation, as was held in *Sprague v. Mo. Pac. Ry. Co.*, 34 Kan. 347, 8 Pac. 465, and *Goggin v. K. P. Ry. Co.*, 12 Kan. 416, but are absolutely wanting when applied to a loss resulting from a decline in the market price. It is said in the *Poole Case*, *supra*, that "such contracts and notices required by them must be reasonable. Agreements of this character are viewed with some strictness by the law, and, unless the exemption from liability is clearly expressed, it should not be allowed." No possible inconvenience could be suffered by the railway company through failure to receive such notice. It already knew as well as the shipper that the transportation and delivery had been delayed, the exact time of the delay, and that the market for that day was over. Whether the market the next day would show a rise or decline—a benefit or loss to the shipper—was a matter of pure speculation upon which the railway company was perhaps as competent to make a guess as was the shipper. Suppose the market in fact should decline and the shipper suffer a loss, the railway company could not reasonably claim that the removal of the cattle from the pens at destination before notice of such loss deprived the company of any advantage, or protection, or of full opportunity to investigate the facts. In principle, therefore, nothing in this contract distinguishes it from the one in the *Poole Case* or that of the *Cornelius Case*. The demurrer to the evidence was properly overruled.

Most of the alleged errors in the instructions are disposed of by what has been said with respect to the terms of this contract. The instructions generally seem to have been prepared carefully and to state the law applicable to the facts with admirable clearness. We find, however, that, possibly owing to the wrong theory upon which plaintiff below tried his case, two of the instructions were erroneous. One authorized the jury to allow as an item of damages the additional freight paid on the shipment of the 44 head of cattle to Chicago. Plaintiff admitted that no demand had been made that defendant company should forward these cattle to Chicago under contract or otherwise. When the railway company delivered all the cattle to the commission company at Kansas City its contract was certainly ended, so far as concerned the three car loads consigned to Kansas City, and equally so with reference to the two car loads consigned to Chicago, unless notified within a reasonable time of his election to have them carried by it to Chicago. It was still liable for any damage resulting from its negligent delay, but its contract for delivery was ended, subject to this liability. Plaintiff, after the cattle had been delivered, and without any notice to the company or demand that it should forward the cattle, saw fit to reship all of them to Chicago over another road. This gave him no right

whatever to recover additional freight on the 44 head of cattle. This error itself would not call for a reversal because the amount allowed for this item of damages was stipulated between the parties, and only the question whether plaintiff actually paid it submitted to the jury. The slight excess of \$12.32 in the judgment could be easily remedied if that were all.

Another more serious error occurred in the instructions. The jury were instructed that the measure of plaintiff's damages was the loss suffered by the decline in the Chicago market. Plaintiff admitted that he did not know whether he lost more by shipping to Chicago than he would have lost by staying in Kansas City for the next day's market or not. He testified as follows: "Q. Then, from what we have learned concerning the market in Kansas City the day before [the 28th] you could have done better in Kansas City? A. Well, that is something I don't know. I shipped to Chicago to better my condition, on the advice of my commission men. Q. You took chances on getting a better market? A. Certainly; I have took my chances every time I shipped. Q. You don't want the railroad company to take your chances, on your getting a better market in Chicago? A. No, of course; but I simply shipped through because I was delayed and was too late for the market in Kansas City and the prospect was it would be still worse the next day, and my commission men advised me to ship on to Chicago, that I might strike a better market Friday, the day I would naturally be on the market." He might, if his commission company had so advised, have shipped these cattle to Liverpool, and with equal propriety have claimed that the measure of his damages was the loss occasioned by a later decline there. The measure of his damages was clearly the loss occasioned by the decline in the market at Kansas City, resulting from the negligent delay in arriving there. It is impossible to ascertain from the verdict or the special findings which market price was considered in determining that the loss by the decline amounted to 25 cents per 100. But plaintiff introduced in evidence the returns of the sale at Chicago, and while evidence was given of a decline at both markets, the basis necessarily involved in determining the loss was the amount the cattle sold for at the wrong market on the wrong day. The court instructed the jury that, if they found plaintiff entitled to recover, "he would be entitled to recover the difference between the market value of the steers at the usual time they were to be delivered in Chicago, Ill., and Kansas City, Mo., and the market value of the steers on the day they were actually sold."

This was error for which the cause must be reversed, and remanded for another trial. All the Justices concurring.

PEOPLE *ex rel.* STEAD, atty. Gen., *v.* CHICAGO, I. & L. RY. CO.
et al.

(Supreme Court of Illinois, Oct. 23, 1906. Rehearing Denied Dec.
5, 1906.)

[79 N. E. Rep. 144.]

Railroads—Regulation—Railroad Commission—Foreign Corporations.—The railroad and warehouse commission act (Hurd's Rev. St. 1905, c. 114, § 6) requires every railroad company "incorporated or doing business in the state, or which shall hereafter become incorporated, or do business under any general or special law in the state," to report before a certain day in each year to the commissioners as to the affairs of the corporation, in respect to certain subjects which are designated. Section 7 authorizes the commissioners to propound any additional interrogatories, and section 8 makes the statute applicable to the directors and officers, and to every lessee, manager, and operator of any railroad in the state. Section 10 makes it the duty of the commission to report its doings to the Governor, and section 11 requires the commissioners to examine into the management and all other matters concerning the business of railroads, so far as the same pertains to the relation of the roads to the public, and to the security and accommodation of persons doing business therewith. Section 26, c. 32, Hurd's Rev. St. 1905, provides that foreign corporations "doing business in the state" shall be subject to all duties and restrictions imposed on domestic ones. Held, that chapter 14 applies to foreign corporations doing business in the state, as well as to domestic ones.

Commerce—Regulation—Powers of State.*—Section 6 of the statute (Hurd's Rev. St. 1905, c. 114) is not void under the commerce clause of the federal Constitution, and this, notwithstanding the interstate commerce law of 1887 (Act Cong. Feb. 4, 1887, 24 Stat. 386, c. 104 [U. S. Comp. St. 1901, p. 3169]), section 20 of which requires a report to the interstate commerce commission, substantially the same as required by section 6.

Mandamus by the people, on the relation of W. H. Stead, as Attorney General, to compel the Chicago, Indianapolis & Louisville Railway Company and W. H. McDoel, as its president and general manager, to report to the railroad and warehouse commission, as required by Hurd's Rev. St. 1905, c. 114. Writ awarded.

W. H. Stead, Atty. Gen., and *George B. Gillespie*, for petitioners.

G. N. Kretzinger and *L. L. Smith*, for respondents.

VICKERS, J. This is an original petition for mandamus in this court in the name of the people of the state of Illinois, on the relation of W. H. Stead, as Attorney General, against the Chicago, Indianapolis & Louisville Railway Company (hereinafter called the "Company"), a nonresident railway corporation, and W. H.

*For the authorities in this series on the subject of state regulation of interstate commerce, see foot-notes appended to *Railroad Com'rs v. Atlantic Coast Line R. Co. (S. Car.)*, 20 R. R. R. 745, 43 Am. & Eng. R. Cas., N. S., 745.

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McDoel, president and general manager of said company, praying for a peremptory mandamus commanding respondents to report to the railroad and warehouse commission, as required by section 6 of an act to establish a board of railroad and warehouse commissioners and prescribe their duties, approved April 13, 1871 (Hurd's Rev. St. 1905, c. 114). The petition avers that the said company has been and is possessed of, owning, and operating, by lease or otherwise, a certain line of railway from a point on the state line dividing the state of Illinois from the state of Indiana, to a point in the city of Chicago, about 19 miles in length and located in the county of Cook and the state of Illinois; that Chicago is the terminal point of said company, where it maintains depots, freight, storage, and warehouses for the handling of freight and passenger traffic, and yards, side and terminal tracks for the handling of cars and the transaction of its business as a common carrier; that the said company is operating, by lease or otherwise, a large system of railway within the states of Indiana, Illinois, and Ohio, and terminating in the city of Louisville, in the state of Kentucky; that the company receives a large amount of business, both passenger and freight, as a common carrier in the city of Chicago and transports the same to the other states; that said company is possessed of a large amount of railroad property in the city of Chicago and along its line in the state of Illinois which is subject to taxation under the laws of this state; that said company and its president have wholly neglected and refused to make or cause to be made a report in accordance with the law as above set forth; that suit has been commenced by the petitioner against respondents to recover the penalties prescribed by said act for a failure to make said report as required by said section 6, in the circuit court of Cook county, where said cause is now pending, but that said case will not be reached for trial, in the regular course of the call of the Cook county docket, earlier than from three to five years. The petition prays for a writ of mandamus commanding respondents to make the report required by said section 6, which petitioner avers, in information and belief, will not be made until compelled by the order of some court of competent jurisdiction. Respondents have filed demurrers, both general and special, to the petition, and the questions here involved relate to the sufficiency of the petition when challenged by demurrer.

First. Respondents contend that section 6 of the railroad and warehouse commission act has no application to this company, as the petition shows on its face that the company is a foreign corporation engaged in interstate commerce, and that said section should be so construed as to exclude this company, thereby obviating a construction that would render the section void, as being an attempt by the state to interfere with the exclusive jurisdiction of Congress over the subject of interstate commerce.

Section 6 of said act is as follows: "Every railroad company incorporated or doing business in this state, or which shall

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hereafter become incorporated, or do business under any general or special law of this state, shall, on or before the first day of September, in the year of our Lord 1871, and on or before the same day in each year thereafter, make and transmit to the commissioners appointed by virtue of this act, at their office in Springfield, a full and true statement, under oath of the proper officers of said corporation, of the affairs of their said corporation, as the same existed on the first day of the preceding July." Then follow 41 clauses designating, in detail, the subjects upon which the report shall furnish information. Section 7 of this act authorizes the commissioners to propound any additional interrogatories to such railroad companies, which shall be answered in the same manner as those specified. Section 8 makes section 6 and 7 applicable to the president, directors, and officers of every railroad company now existing or which shall hereafter be incorporated or organized in this state, and to every lessee, manager, and operator of any railroad in this state. Section 10 of said act makes it the duty of the railroad and warehouse commission to report at least once a year all its doings to the Governor, giving such facts, statements, and explanations as will disclose the actual workings of the railroad systems of the state in their bearing and relation to the business and prosperity of the people of the state. Section 11 requires the commissioners to examine into the management and all other matters concerning the business of railroads, as far as the same pertain to the relation of such roads to the public and to the security and accommodation of persons doing business therewith, and to ascertain whether such railroad companies, their officers, managers, lessees, and agents, comply with the law of the state concerning them. These provisions are all referred to for the reason that all of them seem to have some bearing upon the proper construction of section 6. The language of section 6 is so broad and comprehensive that it is difficult to see how it can be interpreted so as to exclude any railroad company doing business in this state. "Every railroad company incorporated or doing business in this state" clearly includes companies incorporated under the laws of Illinois and companies incorporated under the laws of other states and which are engaged in the usual business of a railroad corporation within this state. The expression "doing business in this state" occurs in section 26 of chapter 32 (Hurd's Rev. St. 1905) and is used with respect to foreign corporations. This language has been defined to mean doing the business or character of business for which the corporation was organized. *Bradbury v. Waukegan & Washington Mining Co.*, 113 Ill. App. 600; *Mandel v. Swan Land & Cattle Co.*, 154 Ill. 177, 40 N. E. 462, 27 L. R. A. 313, 45 Am. St. Rep. 124; *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189. In addition to the general averment in the petition that the company was doing business in this state, facts are set out from which it is manifest

this company was extensively engaged in the operation of a railroad line in this state and carried on generally the business of a common carrier of both freight and passengers.

We come more readily to the view that all railroads doing business in this state are included within the purview of section 6 of this act when we consider the object of this legislation as gathered from the general scope of the act and the impossibility of attaining its purposes if it is to be limited to those roads that are exclusively engaged in intrastate commerce. Among the objects to be attained by the creation of the railroad and warehouse commission and in giving to it a supervisory and administrative power over the maintenance, management, and operation of railroads, is to protect the lives and health of the traveling public, to guard against discrimination and oppression, and generally to promote the efficiency of railroad companies in the discharge of their duties to the state and the people. If railroads engaged in interstate commerce are for that reason exempt from the duty imposed by section 6, then they must be excluded from all other provisions of the act for the same reason. In the application of this law we see no reason for a distinction based on the legal residence of the corporation. If a railroad company chartered in Illinois is engaged in interstate commerce, the prohibition of the commerce clause of the federal Constitution applies to the state of Illinois with respect to such company equally with every other state prohibiting one as well as another from imposing any restrictions or burdens on commerce between the states.

Since, in our opinion, section 6 must be held *ex vi termini* applicable to all railroads which are doing business in this state, without reference to the state from which they derive their charters, and wholly regardless of whether they are engaged in interstate or intrastate commerce, we come next to the question whether this section is void under the commerce clause of the Constitution of the United States. This clause provides that Congress shall have power to "regulate commerce with foreign nations and among the several states and with the Indian tribes." Const. U. S: art. 1, § 8, par. 3. No well-defined classification has been made of the laws which a state may properly pass under its taxing or police power and those which it may not pass because of the exclusive power of Congress over interstate commerce. Indeed the difficulties inherent in the subject are such that, so far, courts have dealt with each case by its points of agreement or disagreement with previous cases and deduced therefrom a decision of the case in hand. The cases in the United States Supreme Court on this subject may be classified under one or the other of the following heads: (1) Cases where the power of the state is exclusive; (2) cases in which the state may act in the absence of conflicting legislation by Congress; (3) cases where power of Congress is exclusive and the state cannot act at all. *Bridge Co. v. Kentucky*, 154 U.

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S. 204, 14 Sup. Ct. 1087, 38 L. Ed. 962. This classification is not very helpless in the decision of any given case, since the case must be decided before it can be classified. "Commerce" means the exchange of property, and includes the usual agencies of communication and transportation to effect the exchange. It extends to the means employed to move the property involved and the persons making the contract. Interstate commerce is the exchange of property in one state for property in another, and its essential characteristic is that it involves the moving of property from one state to another. *People v. Reardon* (N. Y. Ct. of App. 1906) 77 N. E. 970. A state, under its inherent and reserved police power, may enact any law promotive of the peace and good order of society, for the preservation of life and health or conducive to the comfort, convenience, and welfare of the people. It is no valid objection that such law operates on the subjects and means of interstate commerce and persons engaged therein, unless, in its effect, it lays some burdens or restrictions thereon which otherwise would not exist. Thus states may exclude animals having contagious diseases. *Ried v. Colorado*, 187 U. S. 137, 23 Sup. Ct. 92, 47 L. Ed. 108. They may prohibit the consolidation of competing or parallel lines of railroad. *Louisville & Nashville Railroad Co. v. Kentucky*, 161 U. S. 677, 16 Sup. Ct. 714, 40 L. Ed. 849. They may compel the erection and maintenance of fences and cattle guards. *Minneapolis & St. Louis Railroad Co. v. Emmons*, 149 U. S. 364, 13 Sup. Ct. 870, 37 L. Ed. 769. They may compel engineers operating freight and passenger engines to have their eyes examined. *Smith v. Alabama*, 124 U. S. 465, 8 Sup. Ct. 564, 31 L. Ed. 508. They may provide for the separation of white and colored races on trains (*Louisville, New Orleans & Texas Railway Co. v. Mississippi*, 133 U. S. 587, 10 Sup. Ct. 348, 33 L. Ed. 784), and prohibit the running of freight trains on Sunday (*Hennington v. Georgia*, 163 U. S. 299, 16 Sup. Ct. 1086, 41 L. Ed. 166). In all these cases, and many others of like character, the state laws in question operated either on subjects or means of or the persons engaged in interstate commerce, and they were sustained on the ground that they were properly within the reserved powers of the states, and did not, in their effect and intention, operate, except incidentally, as a restriction or burden on commerce between the states. These cases, and others in line with them, recognize the right of the state to adopt such laws as, in the wisdom of the Legislature, will subserve the best interests of the people and enforce them against all persons and corporations that come within the territorial jurisdiction, subject to the limitation that no restrictions or burdens shall be laid on interstate commerce. Any business corporation organized under the laws of a foreign state or country which comes into this state for the purpose of doing business becomes subject to all the laws applicable to domestic corporations engaged in the same line of

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business. This is illustrated by foreign insurance companies doing business in this state. They must comply with the laws of the state within which they propose to do business, in the same manner and to the same extent as domestic insurance companies. *Doyle v. Continental Ins. Co.*, 94 U. S. 535, 24 L. Ed. 148. But for the clause of the federal Constitution now under consideration corporations doing an interstate commerce business would stand upon the same footing and be subject to the same regulations as other corporations, either domestic or foreign.

It follows that all the powers which inhere in the people of a state, and which have not been expressly granted to the United States and not prohibited to the states, still reside with the people with respect to common carriers of interstate commerce as well as to persons and companies engaged in other lines of business. The power of a state to create an administrative board and invest it with power to make reasonable rules and regulations applicable to all railroads doing business in the state has been upheld. *Railroad Commission cases*, 116 U. S. 307, 6 Sup. Ct. 334, 29 L. Ed. 636; *New York & Northeastern Railroad Co. v. Town of Bristol*, 151 U. S. 556, 14 Sup. Ct. 437, 38 L. Ed. 269; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 24 Sup. Ct. 365, 48 L. Ed. 538; *Houston & Texas Central Railway Co. v. Mayes*, 201 U. S. 321, 26 Sup. Ct. 491, 50 L. Ed.—; *McNeill v. Southern Railway Co.*, 202 U. S. 543, 26 Sup. Ct. 722, 50 L. Ed.—. In the *Mayes Case*, above cited, Mr. Justice Brown, on page 328 of 201 U. S. and on page 492 of 26 Sup. Ct. (50 L. Ed. —), uses this language: "That notwithstanding the exclusive nature of this power [to regulate commerce], the states may, in the exercise of their police power, make reasonable rules with regard to the methods of carrying on interstate business, the precautions that shall be used to avoid danger, the facilities for the comfort of passengers, and the safety of freight carried, and, to a certain extent, the stations at which stoppages shall be made, is settled by repeated decisions of this court. Of course, such rules are inoperative if conflicting with regulations on the same subject enacted by Congress, and can be supported only when consistent with the general requirement that interstate commerce shall be free and unobstructed and not amounting to a regulation of such commerce. As the power to build and operate railways and to acquire land by condemnation usually rests upon state authority, the Legislatures may annex such conditions as they please with regard to intrastate transportation, and such other rules regarding interstate commerce as are not inconsistent with the general right of such commerce to be free and unobstructed."

In the light of these authorities, what should be the rule in the case at bar? Here the state has created an administrative agency, called "railroad and warehouse commission." It has enjoined upon this commission certain duties, among others, to

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examine into the condition and management and all other matters pertaining to railroads, so far as the same concerns the relation of such roads to the public and the accommodation and security of persons doing business therewith. They are required to report such facts, statements, and explanations to the Governor once each year as will disclose the actual working of the railroad system of transportation, in their bearings upon the business and prosperity of the people. All this is, manifestly, for the purpose, in part, at least, of uncovering the necessity for such corrective legislation as the state may properly enact. How is the commission to perform these duties, unless it has some means of obtaining the necessary data upon which it can act, and such as the executive and legislative branches of the government will require as a guide in the application of appropriate remedies? Section 6 meets this requirement and is the superstructure of the whole act. This law does not impose any tax or license on the business or the property of the company. It does not direct when or how its trains shall be run, or seek to direct, manage, or control its internal affairs. So far as this particular section is concerned, it, in effect, says: "Do your business in your own way, but report to the people of the state once a year what you have, what you are doing, and how you are doing it." This, in our opinion, is not a restriction or a burden on interstate commerce, within any rule laid down in any of the adjudged cases. If it be said that the information called for may be used as the basis of some future unconstitutional legislation, we reply that it will be time enough to meet that emergency when it arises, if it ever does.

It is said in argument that, Congress having acted on this subject in the passage of the interstate commerce law of 1887 and the several amendments thereto, the right of the state to legislate on that subject is gone, and the power of Congress is exclusive. This would be sound, if there was a collision between the state and federal statutes. In such case the federal statute would prevail over the state law; and, if the state law was a regulation of interstate commerce, it would give way under the Constitution, whether Congress had acted or not. But in a case where the state law is not repugnant to the Constitution, and is not in conflict with existing federal legislation on the subject, we do not understand that the bare fact that Congress has assumed to act makes the powers granted to the federal government greater, or those reserved to the state less, than they would be without such action. In respect to subjects over which the power of Congress is exclusive, a failure to act means that the subject is to be left free (*Robbins v. Shelby County Taxing District*, 120 U. S. 489, 7 Sup. Ct. 592, 30 L. Ed. 694; *Leisy v. Harding*, 135 U. S. 100, 10 Sup. Ct. 681, 34 L. Ed. 128); and in regard to subjects exclusively under the control of Congress, such as the regulation of interstate commerce, but which are at the same time and within certain limitations subject to the police

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regulations of the state, then the state regulation is only void in the particulars wherein it conflicts with the federal law on the subject. There is no conflict between section 6 and the federal law on the same subject. Section 20 of the interstate commerce law (Act Feb. 4, 1887, c. 104, 24 Stát. 386 [U. S. Comp. St. 1901, p. 3169]) requires a report to the interstate commerce commission, substantially the same as required by our statute. The similarity is, indeed, so striking as to suggest that the one might have been modeled after the other. The section of the statute is free from the objection that it is void under the provisions of the Constitution relating to commerce or as being in conflict with the federal law.

Respondents have argued some other matters of minor importance, but none of them, in our view, afford any reason for sustaining the demurrer. The facts alleged in the petition show a clear right to the writ. The demurrer will therefore be overruled, and a peremptory writ of mandamus awarded.

Writ awarded.

GREER v. UNION ST. RY. CO.

(Supreme Judicial Court of Massachusetts, Bristol, Nov. 27, 1906.)

[79 N. E. Rep 267]

Carriers—Injuries to Passengers—Admissibility of Evidence.*—In an action for injuries to a person while boarding a street car, caused by its starting suddenly, where it is shown that the car came to a full stop at the time and place of the injury to receive passengers, evidence of a custom of defendant not to stop on other occasions had no bearing on the issue of whether or not the car started suddenly at the particular time under inquiry, and was inadmissible.

Same—Invitation to Board Moving Car.*—In an action for injuries to a person while boarding a street car, evidence of a custom of defendant not to stop on other occasions was not admissible, on the theory that it showed an implied invitation to plaintiff to board the car while in motion, where plaintiff did not claim that he knew of such custom or that he found the car moving when he stepped upon it.

Witnesses—Cross-Examination—Testing Credibility of Witnesses.—A question to a witness on cross examination, which had no bearing on the issues in the case, was not admissible for the purpose of testing his credibility, where the evidence which might have been elicited by the question had no tendency to contradict any testimony in his direct or previous cross-examination.

Exceptions from Superior Court, Bristol County; Edward P. Pierce, Judge.

Action by George A. Greer against the Union Street Railway Company. Judgment for defendant, and plaintiff excepts. Exceptions overruled.

Mayhew R. Hitch, for plaintiff.

Oliver Prescott, Jr., and *Henry S. Knowles*, for defendant.

*See extensive note, 18 R. R. R. 296, 41 Am. & Eng. R. Cas. N. S., 296.

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RUGG, J. This is an action of tort for personal injuries suffered by the plaintiff while in the act of boarding the defendant's car. The case, as set out in both counts of the declaration, alleged a negligent starting of the car by the defendant. The plaintiff's testimony was that the defendant's car, which was an old-fashioned, open electric car, had stopped on Purchase street in the city of New Bedford south of a cross-walk on the southerly side of William street, and that he was in the act of boarding the car for the purpose of being transported as a passenger and had one foot on the running board and one hand upon the stanchion when the car, which had been previously stopped, suddenly started, and that he heard no bell given to start the car. There was other testimony that the car stopped at this point for the purpose of taking on and letting off passengers. The motorman testified that he stood upon the front platform of the car looking forward and attending to his duties, that he got the bell to start the car, started up and came to a stop on the further side of William street, and that he did not see the plaintiff and knew nothing of the accident until after he had fallen. The conductor testified that the car stopped, as claimed by the plaintiff, to take on passengers; that he looked in the direction from which the plaintiff came, saw no persons approaching the car or making any signal, looked in the opposite direction to see if passengers were coming from the opposite side of the street and seeing no person approaching, gave the bell to start the car, and although standing upon the rear platform upon the opposite side from that on which the plaintiff sought to board the car, he saw nothing of the plaintiff until he had fallen. This testimony was uncontradicted. There was no testimony that the plaintiff made any signal to either the conductor or motorman before attempting to board the car, or saw them or had any information as to whether they saw him. The defendant introduced testimony tending to show that the car was moving when the plaintiff sought to board it. There was other evidence from which the jury could infer due care on the part of the plaintiff and negligence on the part of the defendant. In this state of the evidence, the plaintiff in cross-examination of the defendant's conductor, asked, "If it was not a common occurrence for cars to be slowed down for the purpose of allowing intending passengers to board the cars while the cars were moving at a slow rate of speed and if that was not customary." Upon objection by the defendant, this question was excluded and the plaintiff's exception to this ruling presents the only point raised by the exceptions.

From the foregoing statement of testimony, it appears to have been uncontradicted that the car came to a full stop and for the purpose of discharging and receiving passengers. This being so, proof of a custom of the defendant not to stop on other occasions had no bearing upon the issue raised, which was whether or not the car started suddenly at the particular time under

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inquiry. It is contended by the plaintiff that proof of such a custom would have shown an implied invitation to him to board the car while in motion. But the plaintiff did not claim that he knew of any such custom, nor upon his own testimony did he suppose that the car was in motion or find it to be moving when he stepped upon it. There can be no invitation when upon undisputed evidence no call, articulate or inarticulate, is communicated to anybody and when no one is allured into action or lulled into quiet. At best, the alleged invitation never reached the plaintiff and was never acted upon by him.

The evidence which might have been elicited by this question had no tendency to contradict any testimony given by the witness in his direct or previous cross-examination, nor to show that he had made inconsistent statements on other occasions. The discretion of a trial court must in large measure determine the extent to which cross-examination upon wholly collateral issues may be permitted for testing a witness' honesty, credibility or accuracy of recollection. *Robinson v. Old Colony St. Ry. Co.*, 189 Mass. 594, 76 N. E. 190. Such discretion was wisely exercised in the present case by refusing to permit the question to be put.

Exceptions overruled.

TRAPHAGEN v. ERIE R. CO.

(Court of Errors and Appeals of New Jersey, Nov. 19, 1906.)

[64 Atl. Rep. 1072.]

Carriers—Injury to Passengers—Negligence—Evidence.—Plaintiff was injured while alighting from a passenger coach of the defendant by her heel catching on the step. The negligence alleged is the height of the step from the ground. The car did not differ from other cars of the defendant and there was no evidence that the height was unusual. Held, that there was no evidence of negligence for the jury.

Same—Duties—Care Required.*—A railroad company must afford reasonable means for passengers to alight, and use careful judgment in the method of construction it adopts, but is not bound to exercise an infallible judgment, and is guilty of no breach of duty if the method of construction adopted is in common use and approved by experience.

Pitney, Vredenburg, and Vroom, JJ., dissenting.
(Syllabus by the Court.)

Error to Supreme Court.

Action by Marguerite C. Traphagen against the Erie Railroad

*For the authorities in this series on the subject of a carrier of passenger's duties and liabilities with respect to vehicles, see foot-notes appended to *Spooner v. Old Colony St. Ry. Co.* (Mass.), 19 R. R. R. 727, 42 Am. & Eng. R. Cas., N. S., 727; *Weinschenck v. New York*, etc. R. R. (Mass.), 19 R. R. R. 722, 42 Am. & Eng. R. Cas., N. S., 722; extensive note, 18 R. R. R. 296, 41 Am. & Eng. R. Cas., N. S., 296

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Company. Judgment for defendant, and plaintiff brings error. Affirmed.

Warren Dixon, for plaintiff in error.

Wm. H. Corbin and *George S. Hobart*, for defendant in error.

SWAYZE, J. The plaintiff was injured May 22, 1900, while alighting from a passenger coach of the defendant at Ridgefield. The negligence relied on, as stated in the plaintiff's brief, is threefold: Stopping the car at a point beyond the platform; failure of the train crew to assist the plaintiff to alight; and a structural defect in the step of the car. The plaintiff's own account of the accident is as follows: "I took hold of the railing with my right hand, and I put my right foot down first, but as I didn't reach the ground I slipped forward and my left foot slipped along until it caught at my heel which drew up my knee, and I came bent down on my knee which broke the knee pan." In answer to a subsequent question she said: "Why, I simply attempted to step down, and when I found I couldn't reach the ground, why, I fell forward." There is no other account of the accident. It happened shortly after 12 o'clock on "a very clear, beautiful day." There was evidence that the step was about 24 to 28 inches from the ground, but this was a mere estimate of the witness, not an actual measurement. A question was asked as to the effort required of an average adult in alighting from such a step, but the question was withdrawn without being answered, and the same witness testified that there was nothing unusual about this car in that respect. Two gentlemen went down the same steps just ahead of the plaintiff, and, as far as the case shows, alighted without difficulty. There was also evidence that a footstool was often placed to aid passengers to alight, and generally some one helped the passengers off. At the close of the plaintiff's case the trial judge ordered a nonsuit.

The plaintiff's evidence makes it clear that her injury is not to be attributed to the condition of the ground where she undertook to alight, but to her heel catching on the step before she touched the ground, as she herself testified the cause of her fall was that she couldn't touch the ground with her foot. It is therefore unnecessary to decide whether or not such a landing place as the company provided, was adequate. The failure to provide a footstool and to assist the plaintiff in alighting was obvious to the plaintiff, and, if she had desired such assistance, she should have at least made her desire known to the conductor who was close at hand. No liability attaches to the defendant by reason of these circumstances.

The only point that merits serious consideration is the suggestion of a structural defect in the steps of the car. The only defect alleged is the height of the step from the ground. There is no proof that this height was unusual; indeed, the proof is that the car was not different from other cars of the defendant, and there is an entire absence of proof as to the height of steps on

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cars of other railroads. If we may be presumed to know that the steps of some cars are lower, we may also be presumed to know that the height varies with different railroads, with different cars upon the same road, and even with different cars of the same train. No standard height is shown to have been adopted, and the managers of each railroad apparently use their own judgment. That judgment varies, doubtless on account of the different problems with which each road has to contend. Whether the height of the step be high or low, accidents will happen that might be avoided in each particular case if the height were different. For instance in *Laffin v. Buffalo & S. W. R. Co.*; 106 N. Y. 136, 12 N. E. 599, 60 Am. Rep. 433, the complaint was that the step was too low and that a space was left between the second step and the edge of the platform. We do not know—and there is no evidence to enlighten us—whether it is practicable to have all platforms so constructed that the steps of the cars may be of a standard height. The existing differences in the usage of different railroads would indicate that such a standard is not practicable. The fact that the use of a footstool is so common, as the evidence here shows it is, is another indication that it had been found impracticable or undesirable to have the car steps lower. We do not mean to say that a railroad company can construct the steps of its cars as it pleases. It must, of course, afford reasonable means for alighting, and must use careful judgment in the method of construction it adopts, but when it appears, as in this case, that the steps are similar to those in common use, which must have proved sufficient for hundreds of passengers, and were actually sufficient for two passengers who alighted just before the plaintiff, and when, also, there is a failure to prove any departure from the usage of other railroads, we think there is no proof which would justify a jury in finding the defendant negligent. To permit such a finding would practically substitute the judgment of a jury for the judgment of the railroad managers, the result would vary with each case, and subject the railroad to the danger of being found guilty of negligence no matter what plan it adopted.

The view we have adopted is the same which was taken by the Court of Appeals in New York in the case cited above. The general principle is the same stated by Chief Justice Beasley in *Hoff v. West Jersey Railroad Co.*, 45 N. J. Law, 201. As he there said, the railroad company is not bound to exercise an infallible judgment. It is guilty of no breach of duty if it selects an instrument in common use and approved by experiences

The judgment of nonsuit should be affirmed.

PITNEY, VREDENBURGH, and VROOM, JJ., dissenting.

LEMBECK v. JARVIS TERMINAL COLD STORAGE CO.

(Court of Errors and Appeals of New Jersey, March 5, 1906.)

[63 Atl. Rep. 257.]

Carriers—Transportation of Goods—Lien for Charges.*—Where freight charges are due from the consignor to a carrier, the carrier's lien for the charges is terminated by its delivery of the goods to the consignee as the agent of the consignor, though the consignee promised to retain the goods until the charges were paid.

Same.*—Where freight charges were due from a consignor to a carrier and the carrier delivered the goods to the consignee on its promise to retain them until the freight charges were paid, if the consignee be regarded as the agent of the carrier the lien for the charges was terminated on their payment to the consignee, though by reason of its insolvency the amount was never received by the carrier.

Appeal from Court of Chancery.

Action by Gustav W. Lembeck against the Jarvis Terminal Cold Storage Company. From the decree (59 Atl. 363), the Erie Railroad Company appeals. Affirmed.

See 59 Atl. 565; 60 Atl. 955.

Collins & Corbin, for appellant.

Frank E. Loughran, for respondent.

GUMMERE, C. J. Gardemann & Jungclaus, wholesale produce dealers, shipped from their place of business in Iowa three cars of poultry and dairy products to the Jarvis Terminal Cold Storage Company at Jersey City, to be held by that company in its warehouse subject to the order of the shippers. The goods reached Jersey City over the line of the Erie Railroad Company, and were delivered by that company to the cold storage company, the consignee, without collecting the freight charges thereon either from the consignor or the consignee. At about the time of the delivery (whether just before or just after the cars were run upon the siding of the storage company is uncertain), the superintendent of the storage company agreed with the railroad company's local agent, at the latter's request, that he would do everything in his power to see that the consigned property was not moved from the storage company's warehouse until the freight charges had been satisfied to the railroad company. Between two and three weeks after the arrival of the first car, and while the contents of the cars were still in the warehouse at Jersey City, Gardemann & Jungclaus procured to be discounted at the Third National Bank of Jersey City their promissory note for \$5,743, secured by a warehouse receipt upon the goods consigned. Of the proceeds of this note \$5,000 went to the makers, and the rest went to the cold storage company to pay the freight and insurance charges upon the consignment. Subsequently, and while the consignment was still in its possession, and while

*See note at end of case.

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it still retained the moneys paid to it in settlement of the freight charges, the cold storage company was adjudged to be insolvent upon proceedings taken against it in the Court of Chancery, and a receiver was appointed. After the appointment of the receiver a company known as the Western Cold Storage Company, who had in the meantime purchased the consigned poultry and dairy products from Gardemann & Jungclaus, began their removal from the Jarvis Company's warehouse. Upon learning of this fact the railroad company protested to the receiver against the removal of the goods, and until its freight charges had been satisfied, claiming that it had a lien upon the goods until that was done. Thereupon the receiver refused to permit the Western Cold Storage Company to take away from the storehouse any more of the consignment, until the claim of the railroad company was disposed of. Negotiations between the railroad company and the eastern agents of the Western Cold Storage Company resulted in the deposit by the latter with the receiver of the sum of \$743, under a stipulation between the parties, by the terms of which the deposit was to stand in lieu of the goods, and was to be held by the receiver until it should be determined by the Court of Chancery whether or not the railroad company had a lien for its freight charges upon those goods. If it was determined by the court that the railroad company had such lien, the deposit was to be held subject thereto, and if it was determined that no lien existed, the deposit was to be returned to the agents of the cold storage company. The matter was then submitted to the court, by prepared pleadings filed in the insolvency proceeding, and, upon the hearing, it was decreed that the railroad company had no lien, and that the agents of the Western Cold Storage Company were entitled to the return of their deposit. From that decree the railroad company appeals.

In our opinion the facts recited justified the decree appealed from. The delivery of the consigned goods by the railroad company to the Jarvis Company, was made to the latter either as the agent of the owners, Gardemann & Jungclaus, or as the agent of the railroad company. If the Jarvis Company received the goods as the agent of the owners, then the common law lien of the railroad company for its freight charges was thereby terminated, notwithstanding the fact that the superintendent of the Jarvis Company promised to see to it, so far as he was able, that the goods should not be removed from the company's warehouse until those charges were paid. A carrier is entitled to retain the goods until his charges are paid, but if he sees fit to deliver to the owner before receiving payment, he thereby relinquishes his right to pursue the goods and must look for payment to the person liable for the freight charges. That this is the settled rule is abundantly shown by the authorities collected in the opinion of the learned vice chancellor who heard the case in the court below. On the other hand, if the Jarvis Company received the goods from the railroad company as the agent of the latter, and

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retained the possession of them as such agent, pending the payment of the freight charges, then the payment to it of those charges by Gardemann & Jungclaus was a payment to its principal, the railroad company, and terminated the carrier's lien.

The decree appealed from should be affirmed.

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I. IN GENERAL.

1. GENERAL RULE.

A common carrier has, at common law, a lien on freight transported by it for all charges due it on account of its carriage, and may retain the goods in its possession until payment for such charges is made or tendered.

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- England.**—*Saville v. Campion*, 2 Barn. & Ald. (Eng.) 503.
- United States.**—*The Bird of Paradise*, 72 U. S. 545; *The Davis*, 10 Wall. (U. S.) 15; *The Eddy*, 72 U. S. 481.
- Alabama.**—*Converse Bridge Co. v. Collins*, 119 Ala. 534, 24 S. E. 561; *Long v. Mobile & M. R. Co.*, 51 Ala. 512.
- Arkansas.**—*Fordyce v. Johnson*, 56 Ark. 430, 19 S. W. 1050; *Hot Springs R. Co. v. Trippe*, 42 Ark. 465, 48 Am. Rep. 65; *Loewenberg v. Arkansas & La. Ry. Co.*, 56 Ark. 439, 19 S. W. 1051; *St. Louis, I. M. & S. Ry. Co. v. Lear*, 54 Ark. 399, 55 Am. & Eng. R. Cas. 415, 15 S. W. 1030.
- California.**—*Frothingham v. Jenkins*, 1 Cal. 42, 52 Am. Dec. 280.
- Colorado.**—*Denver & R. G. Co. v. Hill*, 13 Colo. 35, 21 Pac. 419, 40 Am. & Eng. R. Cas. 145, 4 L. R. A. 376; *Price v. Denver & R. G. Ry. Co.*, 12 Colo. 402, 37 Am. & Eng. R. Cas. 626, 21 Pac. 188.
- Connecticut.**—*Rowland v. New York, etc., R. Co.*, 61 Conn. 103, 23 Atl. 755, 49 Am. & Eng. R. Cas. 61.
- Georgia.**—*Brown, Shipley & Co. v. Clayton*, 12 Ga. 564; *Bird v. Georgia Railroad*, 72 Ga. 655, 27 Am. & Eng. R. Cas. 39.
- Illinois.**—*Cleveland, etc., Ry. Co. v. Holden*, 73 Ill. App. 582; *Bissell v. Price*, 16 Ill. 409; *Galena & C. U. R. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574; *Gregg v. Illinois Cent. R. Co.*, 147 Ill. 550, 61 Am. & Eng. R. Cas. 216, 35 N. E. 343; *Ohio & M. Ry. Co. v. Noe*, 77 Ill. 513; *Schumacker v. Chicago & N. W. Ry. Co.*, 108 Ill. App. 520, 96 N. E. 825, 207 Ill. 199, 10 R. R. R. 644, 33 Am. & Eng. R. Cas., N. S., 644; *United States Express Co. v. Haines*, 67 Ill. 137.
- Iowa.**—*Alden & Co. v. Carver*, 13 Iowa 253, 81 Am. Dec. 430.
- Kansas.**—*Wolf v. Hough*, 22 Kan. 659, 40 Am. & Eng. R. Cas. 136.
- Kentucky.**—*Boggs v. Martin*, 52 Ky. 239; *Cayo v. Pool's Assignee* (Ky.), 55 S. W. 887; *Hause v. Judson*, 34 Ky. 7, 29 Am. Dec. 377; *Thomas v. Frankfort & C. Ry. Co.*, 116 Ky. 879, 76 S. W. 1093, 9 R. R. R. 842, 32 Am. & Eng. R. Cas., N. S., 842.
- Maine.**—*Ames v. Palmer*, 42 Me. 197, 66 Am. Dec. 271.
- Massachusetts.**—*Briggs v. Boston & L. R. Co.*, 88 Mass. 246, 83 Am. Dec. 626; *Adams v. O'Connor*, 100 Mass. 515, 1 Am. Rep. 137; *Burroughs v. Norwick & W. R. Co.*, 100 Mass. 26, 1 Am. Rep. 78; *Crossan v. New York, etc., R. Co.*, 149 Mass. 196, 21 N. E. 367; *Lane v. Old Colony, etc., R. Co.*, 80 Mass. 143; *Potts v. New York & N. E. R. Co.*, 131 Mass. 455, 3 Am. & Eng. R. Cas. 424, 41 Am. Rep. 247; *Stevens v. Boston & W. R. Co.*, 8 Gray (Mass.) 262; *Whitney v. Beckford*, 105 Mass. 267.
- Mississippi.**—*Illinois Cent. R. Co. v. Brookhaven Machine Co.*, 71 Miss. 663, 16 So. 252.
- Missouri.**—*Evans & Hollinger v. Chicago & A. R. Co.*, 76 Mo. App. 472; *Kansas City Transfer Co. v. Neiswanger*, 18 Mo. App. 103; *Moore v. Henry*, 18 Mo. App. 35; *Pearce v. Wabash R. Co.*, 89 Mo. App. 437; *Wells v. Thomas*, 27 Mo. 17, 72 Am. Dec. 228.
- Nebraska.**—*Chicago, etc., R. Co. v. Colby* (Neb.), 96 N. W. 145.
- New Jersey.**—*Central R. Co. v. MacCartney*, 68 N. J. L. 165, 52 Atl. 545.
- New Mexico.**—*Santa Fee Pac. R. Co. v. Bossut*, 62 Pac. 977, 10 N. Mex. 323.
- New York.**—*Langworthy v. New York & H. R. Co.* (N. Y. Com. Pl.), 2 E. D. Smith 195; *Mallory v. Burnett* (N. Y. Com. Pl.), 1 E. D. Smith 234; *Van Bokkelen v. Ingersoll*, 5 Wend. (N. Y.) 315; *Western Trans. Co. v. Hoyt*, 65 N. Y. 230, 25 Am. Rep. 175.
- Ohio.**—*Slipher v. Fisher*, 11 Ohio 299.
- Pennsylvania.**—*Fuller v. Bradley*, 25 Pa. St. 120.
- Rhode Island.**—*Knight v. Providence, etc., R. Co.*, 13 R. I. 572, 9 Am. & Eng. R. Cas. 90, 43 Am. Rep. 46; *Vaughan v. Railroad*, 11 R. I. 578, 9 Am. & Eng. R. Cas. 41.
- Tennessee.**—*Rankin v. Memphis & Cincinnati Packet Co.*, 56 Tenn. 564, 24 Am. Rep. 339; *Swan v. Louisville & N. R. Co.*, 106 Tenn. 229, 61 S. W. 57.

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Washington.—*Moses v. Port Townsend, etc., R. Co.*, 5 Wash. 595, 32 Pac. 488, 55 Am. & Eng. R. Cas. 418.

Wisconsin.—*Warehouse & Builders' Supply Co. v. Galvin*, 96 Wis. 523, 71 N. W. 804; *Schneider v. Evans*, 25 Wis. 241, 3 Am. Rep. 56.

Rate Misquoted by Carrier's Agent.—But if the agent of a railroad, on being asked by a shipper the rate of freight to a certain point, misunderstands the question, and quotes the rate of freight to a nearer point, and the shipper pays the charges based upon the rate given him, and after his departure the mistake is discovered but the goods are shipped to their destination, there is not a contract of shipment at the rate quoted by the agent; and the company is entitled to hold the goods until it has recovered its reasonable charges for transporting them. So held in *Rowland v. New York, etc., R. Co.*, 61 Conn. 103, 23 Atl. 755, 49 Am. & Eng. R. Cas. 61.

2. PRIVATE CARRIERS.

Some commentators insist that on principle a private carrier should have a lien, but say the decisions hold he has none. See 5 Am. & Eng. Ency. of Law (2d Ed.) 402; *Hutchinson on Carriers* (2d Ed.), § 46; *Fuller v. Bradley*, 25 Pa. St. 120; *Riddle v. New York, etc., R. Co.*, 1 Interstate 604.

One not a common carrier, but who specially undertakes to carry a particular load for hire, has no lien for freight unless he reserves it by contract. So held in *Fuller v. Bradley*, 25 Pa. St. 120.

In *Jones on Liens*, § 276, the author says: "Upon general principles, however, there seems to be no reason why a private carrier should not have a lien for performing services similar to those rendered by a public carrier."

Reason in Favor of Private Carrier.—In *Hutchinson on Carriers*, § 46, the author says: "It seems not to be well settled whether a private carrier for hire has a lien upon the goods in respect to which he performs the service or not. There would seem to be no satisfactory reason why he should not have the same right to hold the goods until his charges for their carriage are paid, as the warehouseman, the wharfinger or the artisan, who, by his labor or skill, has added to their value."

Common Carrier on First Trip.—One who holds himself out to the public to carry for hire is a common carrier as much in his first trip as in any subsequent one, and has a lien on the cargo for freight. So held in *Fuller v. Bradley*, 25 Pa. St. 120.

3. LIEN NOT TRANSFERABLE.

The lien of a common carrier on goods transported by him is a personal privilege which is not transferable. So held in *Ames v. Palmer*, 42 Me. 197, 66 Am. Dec. 271.

In this case, it is said in the opinion: "It has been repeatedly decided, both in England and in this country, that the lien of a factor is a personal privilege which is not transferable, and that no question upon it can arise except between the principal and factor. *Daubigny v. Duval*, 5 D. & E. 604; *McCombie v. Davies*, 7 East 5; *Jones v. Sinclair*, 2 N. H. 319; *Holly v. Huggeford*, 8 Pick. 73; *Pearsons v. Tincker*, 36 Me. 384. No reason is apparent why the same consequences should not attach to the lien of a common carrier as to that of a factor. In both cases the nature of the lien is the same. Both are common-law liens. The subject of these liens being the same, their effect must be the same."

Lien Assigned to True Owner—Suit for Conversion by Consignee.—The lien of a common carrier on goods for freight charges is not transferable; and if the true owner pays the freight charges and the carrier's lien is assigned to him, and he thereby gets the goods into his possession, the lien will not be available to him as a defense in a subsequent suit by the shipper, who was also the consignee, against

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him, for conversion. So held in *Rosencranz v. Swofford Bros.' Dry Goods Co.*, 175 Mo. 518, 75 S. W. 445.

II. SCOPE OF LIEN.

1. FREIGHT CHARGES.

Of course, under this rule, a common carrier has a lien on goods carried by it for its own freight charges.

England.—*Saville v. Campion*, 2 Barn. & Ald. (Eng.) 503.

United States.—*The Bird of Paradise*, 72 U. S. 545; *The Eddy*, 72 U. S. 481.

Illinois.—*Cleveland, etc., Ry. Co. v. Holden*, 73 Ill. App. 582; *Galena & C. U. R. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574; *Ohio & M. Ry. Co. v. Noe*, 77 Ill. 513.

Kansas.—*Wolf v. Hough*, 22 Kan. 659, 40 Am. & Eng. R. Cas. 136.

Kentucky.—*Thomas v. Frankfort & C. Ry. Co.*, 116 Ky. 879, 76 S. W. 1093, 9 R. R. 842, 32 Am. & Eng. R. Cas., N. S., 842; *Cayo v. Pool's Assignee (Ky.)*, 55 S. W. 887.

Maine.—*Ames v. Palmer*, 42 Me. 197, 66 Am. Dec. 271.

Massachusetts.—*Briggs v. Boston & L. R. Co.*, 88 Mass. 246, 83 Am. Dec. 626; *Lane v. Old Colony, etc., R. Co.*, 80 Mass. 143.

Missouri.—*Evans & Hollinger v. Chicago & A. R. Co.*, 76 Mo. App. 472; *Moore v. Henry*, 18 Mo. App. 35; *Pearce v. Wabash R. Co.*, 89 Mo. App. 437.

New Jersey.—*Central R. Co. v. MacCartney*, 68 N. J. L. 165, 52 Atl. 575.

Tennessee.—*Swan v. Louisville & N. R. Co.*, 106 Tenn. 229.

Wisconsin.—*Warehouse & Builders' Supply Co. v. Galvin*, 96 Wis. 123, 71 N. W. 804.

1. FREIGHT CHARGES OF PRIOR CONNECTING CARRIERS PAID BY TERMINAL CARRIER.

The terminal carrier has a lien upon the goods for the freight charges of connecting carriers which it may have properly paid in the usual course of business.

Alabama.—*Converse Bridge Co. v. Collins*, 119 Ala. 534, 24 So. 61; *Long v. Mobile & M. R. Co.*, 51 Ala. 512.

Arkansas.—*Fordyce v. Johnson*, 56 Ark. 430, 19 S. W. 1050; *Hosprings Railroad Co. v. Trippe*, 42 Ark. 465; *Loewenberg v. Arkansas & La. Ry. Co.*, 56 Ark. 439, 19 S. W. 1051; *St. Louis, I. M. & S. Ry. Co. v. Lear*, 54 Ark. 399, 55 Am. & Eng. R. Cas. 415, 15 S. W. 1030.

Colorado.—*Denver & R. G. Co. v. Hill*, 13 Colo. 35, 21 Pac. 914, 0 Am. & Eng. R. Cas. 145, 4 L. R. A. 376; *Price v. Denver & R. G. Ry. Co.*, 12 Colo. 402, 37 Am. & Eng. R. Cas. 626, 21 Pac. 188.

Georgia.—*Bird v. Georgia Railroad*, 72 Ga. 655, 27 Am. & Eng. R. Cas. 39.

Illinois.—*Bissell v. Price*, 16 Ill. 409; *Galena & C. U. R. Co. v. Rae*, 18 Ill. 488, 68 Am. Dec. 574; *United States Express Co. v. Laines*, 69 Ill. 137.

Kansas.—*Wolf v. Hough*, 22 Kan. 659, 40 Am. & Eng. R. Cas. 136.

Kentucky.—*Cayo v. Pool's Assignee (Ky.)*, 55 S. W. 887; *Thomas v. Frankfort & C. Ry. Co.*, 116 Ky. 879, 76 S. W. 1093, 9 R. R. 42, 32 Am. & Eng. R. Cas., N. S., 842.

Massachusetts.—*Adams v. O'Connor*, 100 Mass. 515, 1 Am. Rep. 37; *Briggs v. Boston & Lowell R. Co.*, 88 Mass. (6 Allen) 246, 3 Am. Dec. 626; *Burroughs v. Norwick & W. R. Co.*, 100 Mass. 26, 1 Am. Rep. 78; *Crossan v. New York, etc., R. Co.*, 149 Mass. 196, 1 N. E. 367, 40 Am. & Eng. R. Cas. 136, *Potts v. New York & N. E. R. Co.*, 131 Mass. 455, 3 Am. & Eng. R. Cas. 424; *Stevens v. Boston & W. R. Corp.*, 8 Gray (Mass.) 262; *Whitney v. Beckford*, 105 Mass. 267.

Mississippi.—*Illinois Cent. R. Co. v. Brookhaven Machine Co.*, 71 Miss. 663, 16 So. 252.

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Missouri.—*Evans & Hollinger v. Chicago & A. R. Co.*, 76 Mo. App. 472; *Kansas City Transfer Co. v. Neiswanger*, 18 Mo. App. 103; *Moore v. Henry*, 18 Mo. App. 35; *Pearce v. Wabash R. Co.*, 89 Mo. App. 437; *Wells v. Thomas*, 27 Me. 17, 72 Am. Dec. 228.

New York.—*Mallory v. Burnett* (N. Y. Com. Pl.), 1 E. D. Smith 234; *Western Transp. Co. v. Hoyt*, 69 N. Y. 230, 25 Am. Rep. 175.

Ohio.—*Slipher v. Fisher*, 11 Ohio 299, 303.

Rhode Island.—*Knight v. Providence, etc., R. Co.* (R. I.), 9 Am. & Eng. R. Cas. 90, 13 R. I. 572, 43 Am. Rep. 46; *Vaughan v. Providence, etc., R. Co.*, 13 R. I. 578, 9 Am. & Eng. R. Cas. 41.

Washington.—*Moses v. Port Townsend, etc., R. Co.*, 5 Wash. 595, 32 Pac. 488, 55 Am. & Eng. R. Cas. 418.

Wisconsin.—*Schneider v. Evans*, 25 Wis. 241, 3 Am. Rep. 56.

A common carrier's lien for transportation charges includes charges which it may have advanced to a preceding carrier. So held in *Thomas v. Frankfort & C. Ry. Co.*, 116 Ky. 879, 9 R. R. R. 842, 32 Am. & Eng. R. Cas., N. S., 842, 76 S. W. 1093.

A common carrier has a lien on the goods transported by it for the freight due for the whole route, and may retain the goods until the freight is paid. So held in *Long v. Mobile & M. R. Co.*, 51 Ala. 512.

In *Pearce v. Wabash R. Co.*, 89 Mo. App. 437, it is held, that a common carrier may pay to a connecting carrier charges the latter has paid, and retain possession of the goods for its reimbursement, when the advance charges were such as were incident to the carriage of the goods, such as freight and warehouse charges, and for the discharge of matured and valid liens on the goods, created by law or by the owner, for the nonpayment of which the transit of the goods has been stopped, or their possession withheld from the carrier.

In *St. Louis, I. M. & S. Ry. Co. v. Lear*, 54 Ark. 399, 15 Am. & Eng. R. Cas. 415, 15 S. W. 1030, it is said in the opinion: "But as the prior carrier will not deliver the property without payment of its charges, or what is the same thing, an agreement by the succeeding carrier to pay them, such succeeding carrier cannot be expected or asked to receive it, except in cases where it is authorized to pay the charges."

Schouler on Bailments.—In *Schouler on Bailments*, p. 544, the author says: "A common carrier, then, may usually retain particular goods, by virtue of his lien right, until the freight and charges due thereon for his whole transportation are paid or tendered him, and he cannot be compelled to give them up sooner. This lien moreover, extends to all the proper freight and storage charges upon the goods throughout the whole of a continuous transit over successive lines, since the last carrier or final warehouseman may advance what was lawfully due his predecessors, and hold the property for his reimbursement."

Railroad Charges Advanced by Local Carrier.—A person engaged in the business of carrying freight by wagons from depots to other places for all persons who choose to employ him has a lien upon goods transported by him for hauling, and also for freight charges advanced for the consignee to a railroad company. So held in *Cayo v. Pool's Assignee* (Ky.), 55 S. W. 887.

Freight Charges Advanced by Warehouseman.—But a warehouseman who receives goods from a steamboat in the carrying trade, and pays to the boat the freight charges; does not by reason of such payment obtain a lien upon the goods. So held in *Bass & Co. v. Upton*, 1 Minn. 408.

3. STORAGE CHARGES.

Where the owner or consignee of freight which has been transported by a common carrier fails to take possession of them within a reasonable time, or refuses to receive them, the carrier may store

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the goods and acquire a lien for warehouse or storage charges, and retain his lien for other charges.

Georgia.—*Dixon v. Central of Georgia R. Co. (Ga.)*, 17 Am. & Eng. R. Cas., N. S., 380.

Illinois.—*Gregg v. Illinois Cent. R. Co.*, 147 Ill. 550, 61 Am. & Eng. R. Cas. 218, 35 N. E. 343; *Illinois Cent. R. Co. v. Alexander*, 20 Ill. 23; *M. D. T. Co. v. Hallock*, 64 Ill. 284; *Porter v. Chicago, etc., R. Co.*, 20 Ill. 407; *Shumacher v. Chicago & N. W. R. Co.*, 108 Ill. App. 520, 69 N. E. 825, 207 Ill. 199, 10 R. R. R. 644, 33 Am. & Eng. R. Cas., N. S., 644.

Massachusetts.—*Miller v. Mansfield*, 112 Mass. 260.

Missouri.—*Pearce v. Wabash R. Co.*, 89 Mo. App. 437.

New York.—*Compton v. Shaw (N. Y. Sup. Ct.)*, 1 Hun 441; *Scheu v. Benedict*, 116 N. Y. 510, 22 N. E. 1073.

Cargo Stored in Shipowner's Name.—In *Brittan v. Barnaby*, 21 How. (U. S.) 527, it is held, that the ship is not bound to land an entire shipment in a day, and when landed on different days, if the shipper disregards the notice that such will be the case, and shall not be present to receive the goods, and has made no arrangement for the freight, the goods may be stored in the shipowner's name, to preserve his lien upon them for freight, and for safekeeping, at the consignee's expense and risk.

Refusal to Prepay Freight Charges—Railroad as Warehouseman.—In *Dixon v. Central of Georgia R. Co. (Ga.)*, 17 Am. & Eng. R. Cas., N. S., 380, it is held, that where goods to be shipped are situated upon a spur track of a railway company and the owner has no track scales, thus rendering it necessary to move the loaded cars to the company's depot for the purpose of weighing the same, so as to ascertain the proper amount of freight charges, the delivery of such cars will be treated as having been made to the company at such depot; and when such a delivery is in fact made, and the shipper refuses, on demand, to pay the proper freight charges, and the goods are left in the custody of the company, it has a lien for such goods for proper storage charges, whether they be left in the cars or removed into a warehouse.

Goods in Cars after Termination of Liability as Carrier.—In *Southern Ry. Co. v. Lockwood Mfg. Co. (Ala.)*, 37 So. 667, it is said in the opinion: "It would seem, if the carrier can make an additional charge when it stores the goods in its warehouse, and have a lien for such charges, upon like principles, and for the same reasons, it may make an additional charge, and have a lien therefor, when the goods remain in its cars after its liability as a common carrier has ceased. *Miller v. Georgia R. & Banking Co.*, 88 Ga. 563, 13 S. E. 316, 50 Am. & Eng. R. Cas. 79; *Miller v. Mansfield*, 112 Mass. 260; *New Orleans & Northeastern R. Co. v. George*, 82 Miss. 710, 35 South. 193."

4. CUSTOM DUTIES

Where a common carrier, in the ordinary course of business, has advanced the custom duties on imported goods, in order to obtain possession of them for transportation, it has a lien on the goods for its reimbursement. *Guesnard v. Louisville & N. R. Co.*, 76 Ala. 453, 23 Am. & Eng. R. Cas. 691; *Mitchelson v. Minneapolis, etc., R. Co.*, 67 Minn. 406, 69 N. W. 1106; *Waldron v. Canadian Pac. R. Co.*, 22 Wash. 253, 60 Pac. 653.

In *Guesnard v. Louisville & N. R. Co.*, 76 Ala. 453, 23 Am. & Eng. R. Cas. 691, it is said in the opinion: "It has long been settled, that the general government has a specific lien on imported merchandise, for all duties on such merchandise. *Harris v. Denne*, 3 Pet. 292; *Overton on Law Liens*, 656, 657. And a common carrier, if he advances such charges, in the ordinary course of business, is entitled to be reimbursed therefor, upon every consideration of

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justice, as well as by usage. The authority to carry the goods implies an authority to advance all reasonable back charges, which constitute a lien on the goods, and for which they could be detained; and such lien is preserved in full force for the benefit of the carrier. Overton on Law Liens, §§ 140, 135; Redfield on Carriers, § 282; 2 Redf. on Railways, p. 160, § 13; Knight *v.* Providence, etc., R. Co., 9 Am. & Eng. R. Cas. 90, 13 R. I. 572, 43 Am. Rep. 46."

A terminal carrier, which, under its tariff agreements, has paid the duties exacted under the laws of the United States on bonded goods at the port of entry that the initial carrier was bound to pay in order to regain possession and forward the goods, has a lien on such goods for the amount of such duties. So held in *Wabash R. Co. v. Pearce* (U. S.), 11 R. R. R. 655, 34 Am. & Eng. R. Cas., N. S., 655, 24 Sup. Ct. Rep. 231.

But in *Pearce v. Wabash R. Co.*, 89 Mo. App. 437, Bland, J., in delivering a concurring opinion, said: "But I know of no law which gives the carrier the right to pay import duties and retain a lien on the goods for reimbursement. Such liens are usually confined to claims for the cost of transportation. *Steamboat Virginia v. Kraft*, 25 Mo. 76; *Rushforth v. Hadfield*, 6 East Eng. 519; *Faith v. East India Co.*, 4 B. & Ald. 630; *Hutchinson on Carriers* (2d Ed.), § 478. The lien for carriage is jealously regarded and restricted. *Hutchinson on Carriers* (2d Ed.), § 477; *McFarland v. Wheeler*, 26 Wend. 467; *East Tenn., etc., Co. v. Hunt*, 15 Lea 261; Overton on Liens, § 134. I concede that the reason of the rule, allowing railway companies a lien for back charges for transportation, might well extend it to embrace a claim of this kind, on proof that there is a general custom for carriers to pay import duties, charge the same against the owner of the property and collect them before delivering. This would depend on a usage of trade for, unquestionably, it is opposed to the common law and there is no statute. *White v. Vann*, 25 Tenn. (6 Humph.) 69."

Payment of Claims to Get Possession of Goods Not Obligatory on Carrier.—But the payment of a lien on the goods, which has been created by law or by the owner, for the nonpayment of which the transit of the goods has been stopped, or their possession withheld from the carrier, is not obligatory on the carrier, and if made without the consent of the owner, is at the carrier's risk. So held in *Pearce v. Wabash R. Co.*, 89 Mo. App. 437.

5. SALVAGE CHARGES.

Where the bill of lading stipulated for the delivery of the cargo upon the payment of "freight and charges," and the vessel having sunk, the carrier was sued for the recovery of the cargo, the salvage paid was a charge for which the carrier held a lien upon the whole cargo. So held in *Chicago, etc., R. Co. v. N. W. Union Packet Co.*, 38 Iowa, 377.

6. PORT FEES—SHIPMASTER'S LIEN.

A master of a ship has a lien upon the freight for port fees, repairs, supplies and other necessary expenses incurred in a foreign port; and payment to the shipowner does not discharge such lien after notice to the consignee. So held in *Van Bokkelin v. Ingersoll*, 5 Wend. (N. Y.) 315.

7. DEMURRAGE.

It is generally held, that a railroad company cannot, in the absence of a contract stipulation, acquire a lien upon freight carried by it for charges for the unreasonable detention of its cars. *Miller v. Georgia R. & Banking Co.*, 88 Ga. 563, 15 S. E. 316, 50 Am. & Eng. R. Cas. 79; *Cleveland, etc., R. Co. v. Holden*, 73 Ill. App.

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582; *Chicago & N. W. R. Co. v. Jenkins*, 103 Ill. 588, 9 Am. & Eng. R. Cas. 113; *Crommelin v. New York & H. R. Co.*, 23 N. Y. Super. Ct. 77; *East Tenn., V. & G. R. Co. v. Hunt*, 83 Tenn. 261.

A railroad has no lien upon goods transported by it for demurrage in absence of contract. So held in *East Tenn., V. & G. R. Co. v. Hunt*, 83 Tenn. 261.

The right to demurrage does not attach to carriers by rail. So held in *Chicago & N. W. R. Co. v. Jenkins*, 103 Ill. 588, 9 Am. & Eng. R. Cas. 113.

The lien allowed to a land carrier by law extends only to transportation charges. So held in *Cleveland, etc., R. Co. v. Holden*, 73 Ill. App. 582.

Delay in Unloading Cars Standing in Highway—Breach of Contract Only.—In *Crommelin v. New York & H. R. Co.*, 1 Abb. N. Y. App. Dec. 472, it is held, that the inconvenience to a railroad company from goods being left in their freight cars standing in a public highway, during the unreasonable delay of the consignee to remove the goods, constitutes only a claim in the nature of demurrage, and the company has no lien on the goods for the payment thereof, it being a breach of contract only, for which the carrier must seek redress in the ordinary manner.

Reason Urged against Rule.—In *Schumacher v. Chicago & N. W. R. Co.*, 108 Ill. App. 520, 207 Ill. 199, 10 R. R. R. 644, 33 Am. & Eng. R. Cas., N. S., 644, 69 N. E. 825, it is said in the opinion: "It is urged, further, that a lien (for car rental where unreasonable delay in unloading) ought not to be accorded common carriers in such cases, but they should be left to their action upon the case or in assumpsit. There is no law preventing the sale, by the consignee, of the cargo at the point of destination to one or many persons who may be wholly irresponsible, and as against whom suits would be unavailing."

Neglect or Refusal to Unload Cars—Contract Liens.—A common carrier may lawfully demand payment, as a condition precedent to delivery of goods to a consignee, not only of the stipulated freight charges, but likewise such reasonable charges for the unreasonable detention of its cars as may have accrued on account of the consignee's neglect or refusal to unload them, where such additional charges are contracted for and made a lien upon the goods by stipulation in the bill of lading. So held in *Swan v. Louisville & N. R. Co.*, 106 Tenn. 229, 61 S. W. 57.

Where Carrier Entitled to Charge Car Rental.—And in *Schumacher v. Chicago & N. W. R. Co.*, 108 Ill. App. 520, 207 Ill. 199, 10 R. R. R. 644, 33 Am. & Eng. R. Cas., N. S., 644, 69 N. E. 825, it is held, that where a railroad was entitled to charge rental for the use of cars after the expiration of a reasonable time for unloading, it was entitled to a lien upon freight for such rental charges.

In this case it is said in the opinion: "Nor do we think it necessary to the existence of such lien (for car rentals where delay in unloading) that it arise from a specific contract providing for the same, but that such a contract may arise by implication, as in the case of warehouse charges to a railroad company that has stored goods, transported by it, when not received by the consignee promptly at the place of delivery. *Miller v. Mansfield*, 112 Mass. 260; *Norfolk & Western Railroad Co. v. Adams*, 90 Va. 393, 18 S. E. 673, 22 L. R. A. 530, 44 Am. St. Rep. 916, 56 Am. & Eng. R. Cas. 330; *Darlington v. Missouri Pacific R. Co.*, 99 Mo. App. 1, 72 S. W. 122; *Interstate Commerce Commission v. D. G. H. & M. R. Co.*, 74 Fed. 803; *America Warehouse Ass'n v. Illinois Central Railroad Co.*, 7 Interstate Com. Rep. 556."

Express Stipulation Not Essential.—A railroad company may have a lien for demurrage charges for the detention of cars, even without an express stipulation therefor in the contract of ship-

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ment. So held in *Darlington v. Missouri Pacific R. Co.*, 99 Mo. App. 1, 72 S. W. 122.

Not Bound by Published Rules.—But a consignee of goods shipped by railroad is not bound by rules and regulations of the company providing for a lien for demurrage, though published, without his or the consignor's assent thereto, before the contract of shipment was made, even though the shipper or consignor entered into the contract with knowledge of the existence of such rules. So held in *Chicago & N. W. R. Co. v. Jenkins*, 103 Ill. 588, 9 Am. & Eng. R. Cas. 113.

Lien for Damages from Delay in Removing Goods—Presumption of Assent to Rule—Publication.—There is no legal presumption of the shipper's or consignee's assent to rules of a railroad company providing for a lien for damages caused by delay in removing goods shipped, from the publication of the rules. So held in *Chicago & N. W. R. Co. v. Jenkins*, 103 Ill. 588, 9 Am. & Eng. R. Cas. 113.

Acquiescence in Rule in Particular Instances—No Implied Contract.—Because a consignee has been tardy, in particular instances in removing freight, and has acquiesced in a rule of the railroad company requiring the payment of detention charges without protest, it cannot be held that such acquiescence amounts to a contract to pay such charges in future cases, where there is an unreasonable insistence upon the application of a rule requiring it by the railroad company. So held in *Cleveland, etc., R. Co. v. Holden*, 73 Ill. App. 582.

Liens Only Created by Law or Contract.—Liens of common carriers upon goods carried by them are created by law or contract, and when the law gives no lien, neither party can create it without the consent of the other. So held in *Cleveland, etc., R. Co. v. Holden*, 73 Ill. App. 582.

In *Cleveland, etc., R. Co. v. Holden*, 73 Ill. App. 582, it is held, that a rule providing that forty-eight hours will be allowed for the loading or unloading of any commodity, after which a charge of \$1 per car a day will be made, in the absence of a contract with the shipper to that effect, can give the carrier no lien for the charge.

Lien Not Created by Publishing Intention.—A railroad cannot create in its own favor a demurrage on freight not removed from a car within a certain time by simply publishing its intention to do so. So held in *Cleveland, etc., R. Co. v. Lamm*, 73 Ill. App. 592.

Noncompliance with Rule Prescribing Charge for Delay in Unloading Cars.—But in *Miller v. Mansfield*, 112 Mass. 260, it appeared that a railroad had a regulation and usage by which cars containing certain kinds of goods should be unloaded by the consignee within twenty-four hours after notice to him of their arrival, and for delay in unloading after that time the company charged \$2 a day for each car which contained such freight and was owned by another company. It was held, that for a delay in unloading, the railroad, in its capacity as warehouseman, as against a consignee who had knowledge of the facts, had a lien upon the goods for storage. See also, *Wagon Mfg. Co. v. Ohio & M. R. Co.*, 98 Ky. 152, 32 S. W. 595.

8. EXPENSE OF WAREHOUSING.

The lien upon goods allowed the carrier by law does not include expenses for warehousing them. So held in *Cleveland, etc., R. Co. v. Holden*, 73 Ill. App. 582.

9. LIEN COVERS ONLY CONSIGNMENT UPON WHICH CHARGES ACCRUED.

The common law gives the carrier a lien for freight or other charges only upon the particular consignment of goods on which the charges accrued.

Notes

England.—*Rushforth v. Hadfield*, 6 East (Eng.) 519.

Georgia.—*Robinson v. Dover & S R Co.*, 99 Ga. 480, 27 S. E. 713.

Louisiana.—*Pharr v. Collins*, 35 La. Ann. 939, 48 Am. Rep. 251.

Massachusetts.—*Adams v. Clark*, 63 Mass. 215, 57 Am. Dec. 41.

New Jersey.—*Hartshorne v. Johnson*, 7 N. J. L. 131.

New York.—*McFarland v. Wheeler*, 26 Wend. (N. Y.) 467, *Taylor v. Smith*, 87 N. Y. App. Div. 78; *Van Bokkelen v. Ingersoll*, 5 Wend. (N. Y.) 315.

Pennsylvania.—*Bacharach v. Chester Freight Line*, 133 Pa. St. 414, 19 Atl. 409; *Pennsylvania R. Co. v. American Oil Works*, 126 Pa. St. 485, 17 Atl. 671, 47 Am. & Eng. R. Cas. 357.

In *Hartshorne v. Johnson*, 7 N. J. L. 131, it is held, that a common carrier has a lien on goods transported by him, only for the transportation of those particular goods, and not for the carriage of other goods also, with the possession of which it has parted.

A carrier cannot hold goods by virtue of a lien for back freights on other property. So held in *Leonard's Ex'ors v. Winslow* (Pa.), 2 Grant's Cases 139.

No Common-Law Lien for General Balance.—In *Rushforth v. Hadfield*, 6 East (Eng.) 519, Lord Ellenborough, C. J., said: "The lien claimed by the carriers for their general balance is not founded in the common law; for by the custom of the realm a common carrier is bound to carry the goods of the subject for a reasonable reward to be therefore paid, by force of which he has a lien only for the carriage price of the particular goods."

Freight Due by Consignor on Other Consignments.—When goods are delivered to a carrier, consigned generally to a purchaser at the city of his business and without any particular place of delivery designated, the title of the consignor passes upon delivery of the goods to the carrier, and the carrier, by a condition in the bill of lading, cannot subject the goods to a lien for prior freights due from the consignor on other consignments of goods, and refuse to deliver until such prior freights are paid. So held in *Bacharach v. Chester Freight Line*, 133 Pa. St. 414, 19 Atl. 409.

Right of Stoppage in Transitu—Balance Due Carrier upon Other Consignments from Same Vendor.—Where the consignor and vendor exercises his right of stoppage in transitu, the carrier, as against him, may claim a lien for his charges upon that consignment only, but not for an unpaid balance due from the consignee upon other consignments from the same vendor. So held in *Pennsylvania R. Co. v. American Oil Works*, 126 Pa. St. 485, 17 Atl. 671, 47 Am. & Eng. R. Cas. 357.

Right of Stoppage in Transitu Not Affected by Contract Lien for Arrearages.—A clause in a bill of lading provided: "Said merchandise may be retained for all arrearages of freight and charges due thereon and also on any other goods by the same consignee or owner, and such arrearages and the freight and charges on said goods and merchandise shall be a lien thereon until the same shall have been paid." It was held, that if the consignor, stopping the goods in transitu, was not a debtor for charges and expenses on prior consignments, the carrier's lien did not extend beyond the charges applicable to the goods stopped. So held in *Pennsylvania R. Co. v. American Oil Works*, 126 Pa. St. 485, 17 Atl. 671, 47 Am. & Eng. R. Cas. 357.

Back Charges of Connecting Carriers—Lien Only on Goods Carried by Terminal Carrier.—The lien of a carrier, for back freight paid by him to another carrier, is not measured by the quantity of goods represented, nor the sum advanced by him. It only exists for the quantity of goods actually carried, and for the customary and reasonable rates of transportation. So held in *Travis v. Thompson* (N. Y.), 37 Barb. 236.

Charges Advanced to Preceding Carrier on Article Destroyed on Line of Terminal Carrier.—The terminal carrier cannot as a condi-

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tion precedent to the delivery of an article of freight to a consignee exact from him the payment of freight charges advanced by it to a preceding company upon another article of freight shipped to the same consignee and which was destroyed while on the line of the company last mentioned and never delivered to the consignee at all. So held in *Robinson v. Dover & S. R. Co.*, 99 Ga. 480, 27 S. E. 713.

Failure to Fully Laden Ship—No Lien for Dead Freight—Unliquidated Damages for Breach of Contract.—Where the freighter of a ship covenanted that if she should not be fully laden he would not only pay for the goods on board, but also for so much in addition as the ship would have carried, for which he had before stipulated to pay freight, according to different rates for three descriptions of goods, it was held, that the shipowner had no lien upon the goods actually on board for the amount of the dead freight, in other words for the compensation in damages which he was entitled to for the freighter's breach of contract in not putting a full load on board; which damages were unliquidated; there being no lien in such a case, either by the usage of trade, or the express contract of the parties. *Phillips v. Rodie*, 15 East (Eng.) 546. In this case Lord Ellenborough, C. J., said: "What is a lien for freight but a right to detain the goods on board until the freight which have been actually earned upon them, which is always capable of being calculated and ascertained, has been paid, and where the owner of the goods knows what he is to tender?"

Contract Lien for Unpaid Freights.—Under a bill of lading giving a lien on the goods for all unpaid freights, the carrier was entitled to a lien on the cargo in question for the freight due on such cargo, but not for a general balance due on previous cargoes. So held in *Atlas S. S. Co. v. Colombian Land Co.* (C. C. A.), 102 Fed. Rep. 358.

Lien for General Balance—Sufficiency of Proof of Custom.—The lien of a common carrier for his general balance, however, it may arise in point of law from an implied agreement to be inferred from a general usage of trade, proved by clear and satisfactory instances sufficiently numerous and general to warrant so extensive a conclusion affecting the custom of the realm, yet is not to be favored, nor can be supported by a few recent instances of detention of goods by four or five carriers for their general balance. But such a lien may be inferred from evidence of the particular mode of dealing between the respective parties. So held in *Rushforth v. Hadfield*, 6 East (Eng.) 519.

Goods of Different Persons—Only One Bill of Lading.—The goods of one person cannot, without his consent, be held or made liable for charges due upon those of another, although they were shipped under one bill of lading. So held in *Hale v. Barrett*, 26 Ill. 195, 29 Am. Dec. 367.

Several Consignments Shipped by Same Vendor, under Same Contract of Sale, to Same Vendee—Right to Retain Out of One Consignment Sufficient to Satisfy Charges on All.—But in *Pennsylvania Steel Co. v. Georgia R. & B. Co.*, 94 Ga. 636, 21 S. E. 577, 2 Am. & Eng. R. Cas., N. S., 685, it is held, that where the same vendor, under a single contract of sale, shipped by rail several consignments of goods to the same vendee, each shipment embracing several carloads, the carrier had the right to retain out of any one or more of the consignments enough of the goods in value to pay the charges for freight and storage upon all, without respect to the particular consignments out of which the goods were retained; that this right of the carrier has the same relation to the right of stoppage in transitu by the vendor which it has to the right of the consignee to claim delivery of the retained goods where no stoppage occurred; and that payment of the freight and storage charges must be made before the consignee can obtain possession under the right of stoppage in transitu.

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10. LIEN COVERS ONLY FREIGHT.

The carrier's lien covers only such property as is in the carrier's possession in its capacity as a common carrier or carrier warehouseman.

Only on Articles with Respect to Which a Carrier Service Was Rendered.—In *Taylor v. Smith*, 87 N. Y. App. Div. 78, it is held, that a carrier's lien for services is limited to articles with respect to which he rendered services as a carrier, and does not extend to articles belonging to his employer of which he offered to take charge, but in connection with which he did not render any services as a carrier.

Property Merely Loaded on Car by Public Cartman.—In *Taylor v. Smith* (N. Y. Sup. Ct.), 84 N. Y. Supp. 13, it is held, that where a public cartman, who was engaged in loading cars with goods for plaintiff, agreed to load a vehicle which had been driven to the car by plaintiff, he could have no lien on such vehicle, as he performed no services, as a carrier, with respect to it.

Debt Due Carrier, but Unconnected with Shipment.—In *Pharr v. Collins*, 35 La. Ann. 939, 48 Am. Rep. 251, it is held, that a common carrier cannot seize goods transported by him for a debt due himself individually and wholly unconnected with the shipment while they are in transit and for the safe carriage and delivery of which he has given a bill of lading.

Existing Claims Foreign to Any Charge for Transportation—Advances to Forwarding Agents.—In *Steamboat Virginia v. Kraft*, 25 Mo. 76, it is held, that the custom or usage authorizing carriers to advance to forwarding agents the existing charges on the goods, and to hold the consignees and owners liable therefor, does not extend to or cover advances made on demands upon the consignees or owners wholly foreign to, and disconnected with, any cost or charge for transportation.

11. GOVERNMENT PROPERTY.

It seems that a carrier can acquire no lien upon property of the United States government for services rendered in transporting it, but there is a conflict of authority on this question.

A carrier can acquire no lien upon property of the United States government, for services rendered in transporting it. So held in *Dufolt v. Gorman*, 1 Minn. 301, 66 Am. Dec. 543. See also, *Jones on Liens*, § 279.

Contra.—In *Union Pac. R. Co. v. United States*, 2 Wyo. 170, it is held, that property of the United States government is not exempt from a common carrier's lien for freight.

Salvage.—In *The Davis*, 10 Wall. (U. S.) 15, it is held, that personal property of the United States on board a vessel for transportation is liable to a lien for salvage services rendered in saving the property.

And in *United States v. Wilder*, 3 Sumner, 308, it appeared that the federal government shipped supplies for the public service by the Schooner *Jasper*, from Boston to New York, under the terms of the common bill of lading, by which the goods were delivered on payment of freight. The vessel went ashore on Block Island upon her passage. Expense was incurred in saving the cargo, constituting a case of general average in favor of the owners and master of the *Jasper*, who struck an average of the expense among the freighters, the government included, and refused to deliver the clothing to the latter, on its refusal to provide for its share of the average. The latter denied that its property could be retained for payment. The claim of lien was sustained by the decision of the United States circuit court.

Note

III. DELIVERY OF GOODS AND PAYMENT OF CHARGES
CONCOMITANT OBLIGATIONS.

The delivering of the goods by the carrier and the payment of the charges by the consignee are concomitant obligations, which neither party is obliged to perform until the other is ready to perform the correlative act.

England.—*Skinner v. Upshaw*, 2 Ld. Raym. (Eng.) 752; *Tate v. Leek* (Eng.), 2 Moore 278, 8 Taunt. 280; *Yates v. Railston*, 2 Moore 244, 8 Taunt. 293.

Alabama.—*Long v. Mobile & M. R. Co.*, 51 Ala. 512.

California.—*Frothingham v. Jenkins*, 1 Cal. 42, 52 Am. Dec. 286.

Maine.—*Wilson v. Grand Trunk Railway*, 56 Me. 60, 96 Am. Dec. 435.

Maryland.—*McCullough v. Hellwig*, 66 Md. 269, 7 Atl. 455.

Massachusetts.—*Adams v. Clark*, 63 Mass. 215, 57 Am. Dec. 41; *Bailey v. Damon*, 3 Gray (Mass.) 92; *Portland Bank v. Stubbs*, 6 Mass. 422, 4 Am. Dec. 151.

Michigan.—*Johnston v. Davis*, 60 Mich. 56, 26 N. W. 830.

Minnesota.—*Bass & Co. v. Upton*, 1 Minn. 408.

New York.—*Langworthy v. New York & H. R. Co.* (N. Y. Com. P.), 2 E. D. Smith 195; *Western Transp. Co. v. Hoyt*, 69 N. Y. 20, 25 Am. Rep. 175.

Ohio.—*Bowman v. Hilton*, 11 Ohio 303.

Pennsylvania.—*Fuller v. Bradley*, 25 Pa. St. 120.

Tennessee.—*Rankin v. Memphis & Cincinnati Packet Co.*, 56 Tenn. 34, 24 Am. Rep. 339.

Refusal to Deliver Goods—Trover—Tender Not Required.—A consignee who is ready to pay freight for the goods, on a refusal to deliver them, may maintain trover for the goods, there being no other legal claim upon them; and he is not bound first to make a legal tender of the freight. So held in *East Tenn., V. & G. R. Co. v. Hunt*, 83 Tenn. 261.

Conversion by Carrier—Tender Not Required.—In *Baltimore & O. R. Co. v. O'Donnell*, 49 Ohio St. 489, 32 N. E. 476, it is held, that the rule, that to entitle the consignee to the possession of the goods he must pay or tender to the carrier the legal charges for their carriage has no application in an action against the carrier for the conversion of the goods.

More than Amount Due Demanded—Tender Not Required.—Where the consignee is ready to pay freight on having the goods delivered to him, he may maintain trover against the carriers, or their agents, who, having no legal claim on the goods for any thing besides the freight, refuse to deliver them, unless a further sum is first paid; and the consignee, in such a case, is not bound to make any tender to those in possession of the goods, and their refusal to deliver is evidence of a conversion. So held in *Adams v. Clark*, 63 Mass. 215, 57 Am. Dec. 41.

Same—Detinue or Trover.—If the consignee is ready and willing to pay the freight due, on having the goods delivered to him, and the carrier refuses to deliver them unless he will pay more than is due, the consignee may maintain detinue for the goods, or trover for their conversion, without making formal tender, or paying the money into court. So held in *Long v. Mobile & M. R. Co.*, 51 Ala. 512.

Where the carrier demands a sum in excess of the sum due for freight charges, the consignee need not tender any sum before bringing suit to recover the goods. So held in *Moran Bros. Co. v. Northern Pac. R. Co.*, 19 Wash. 266, 53 Pac. 49.

More than Amount Due Demanded by Mistake.—But in *Loewenberg v. Arkansas & La. Ry. Co.*, 56 Ark. 439, 19 S. W. 1051, it is held, that demand by a carrier, by mistake, of more than is due upon freight is not a waiver of tender of the amount legally due.

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Exercise of Right of Stoppage in Transitu—Payment of Lien Not Condition Precedent to Issuance of Writ of Replevin.—It is not necessary that the lien of the carrier for freight be paid before the writ of replevin be issued at the instance of the vendor exercising his right of stoppage in transitu, it is sufficient if it be paid before the goods are taken from its possession. So held in *Hays v. Mouille*, 14 Pa. St. 48.

IV. CIRCUMSTANCES WHICH MAY PREVENT LIEN FROM ATTACHING.

1. TERMINAL CARRIER'S LIEN.

a. When Bound by Contracts of Initial Carrier.

A terminal carrier is bound by, and must act in accordance with, all the authorized contracts and acts of the initial carrier, of which it is chargeable with notice.

Goods Carried to Wrong Port—Custom Duties Not Incidental to Transportation to Proper Port Advanced by Terminal Carrier.—In *Pearce v. Wabash R. Co.*, 89 Mo. App. 437, it appeared that the goods were shipped in bond from Yokohama, and that the boxes containing the goods were carefully packed and marked "shipped in bond," and that a customs clearance, signed and sworn to, was indorsed or signed by the consul general at Yokohama, showing the entrance of the goods was to be made at St. Louis. It was held, that the goods were entitled to direct transportation to the port of St. Louis, and that, as all the railroads that carried said goods were bonded roads, there was no occasion for their diversion to the port of St. Paul; and that the payment of the customs duties at St. Paul was not necessary nor an incident to the transportation of the goods to the place of destination; and that the railroad which received the goods at St. Paul for transportation to St. Louis had no lien on the goods for reimbursement of the amount paid by it in discharge of the customs duties at St. Paul.

b. Notice of Prepayment of Charges.

Where a connecting carrier is chargeable with notice that the freight charges, at the proper rate, for the entire route have been paid, it has no lien upon the consignment even for its portion of the freight.

In *Travis v. Thompson* (N. Y.), 37 Barb. 236, it is held, that though intermediate or terminal carriers have by custom and by the law the right to collect the proper charges of previous carriers, yet if such previous charges have been paid, the intermediate or terminal carrier cannot assert a lien therefor.

A carrier who receives goods from another carrier, when chargeable with notice that a through contract has been made by the shipper and that the charges to the point of destination have been paid to the initial carrier, is not justified in paying charges claimed by preceding carriers, and cannot assert any lien on the goods either for its own compensation or for any amount it may have paid to the preceding carrier with such notice. So held in *Converse Bridge Co. v. Collins*, 119 Ala. 534, 24 So. 561.

Failure of Preceding Carrier to Inform Terminal Carrier.—But where one carrier receives goods at the end of another carrier's line, and the latter neglects to inform the other carrier that the freight was paid, the receiving terminal carrier is not responsible for such neglect, and has the right to retain the goods in its possession for a reasonable time, until it can inquire into the facts. So held in *Union Express Co. v. Shoop*, 85 Pa. St. 325.

c. Initial Carrier as Agent of Shipper.

But the initial carrier is, ordinarily, to be regarded as the agent

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of the shipper, for forwarding the freight beyond its line, and not of a succeeding connecting carrier, and a subsequent carrier, in the absence of circumstances which should put it on its guard, is not chargeable with notice of unusual contracts, acts or omissions with respect to the freight of the initial carrier, and is not bound by or responsible for them.

Georgia.—*Bird v. Georgia Railroad*, 72 Ga. 655, 27 Am. & Eng. R. Cas. 39.

Indiana.—*Evansville, etc., R. R. Co. v. Marsh*, 57 Ind. 505.

Kansas.—*Wolf v. Hough*, 22 Kan. 659, 40 Am. & Eng. R. Cas. 136.

Massachusetts.—*Briggs v. Boston & L. R. Co.*, 88 Mass. (6 Allen) 246, 83 Am. Dec. 626; *Crossan v. New York, etc., R. Co.*, 149 Mass. 196, 40 Am. & Eng. R. Cas. 136, 21 N. E. 367; *Stevens v. Boston & W. R. Corp.*, 74 Mass. (8 Gray) 262.

Missouri.—*Glover v. Cape Girardeau & So. R. Co.*, 95 Mo. App. 369, 4 R. R. R. 319, 27 Am. & Eng. R. Cas., N. S., 319; *Shewalter v. Missouri R. Co.*, 84 Mo. App. 589; *Wells v. Thomas*, 27 Mo. 17, 72 Am. Dec. 228.

Pennsylvania.—*Union Express Co. v. Shoop*, 85 Pa. St. 325.

Rhode Island.—*Vaughan v. Providence & W. R. Co.*, 13 R. I. 573, 9 Am. & Eng. R. Cas. 41.

Wisconsin.—*Schneider v. Evans*, 25 Wis. 241, 3 Am. Rep. 56.

In *Illinois Cent. R. Co. v. Brookhaven Machine Co.*, 71 Miss. 663, 16 So. 252, it is said in the opinion: "And it is universally held, that in the absence of notice of a special contract, the connecting carrier may receive the goods and charge them with the usual freight over its own line; and very generally held, that it has a lien for freight paid by it to the preceding carrier, though the rate paid be in excess of that provided for by the special contract between such carrier and the shipper. *Hutch on Car.*, § 478a; *Briggs v. Boston & L. R. Co.*, 88 Mass. (6 Allen) 246, 83 Am. Dec. 626; *Wells v. Thomas*, 27 Mo. 17, 72 Am. Dec. 228; *Bird v. Georgia Railroad*, 72 Ga. 655, 27 Am. & Eng. R. Cas. 39; *Knight v. Providence, etc., R. Co.*, 13 R. I. 572, 43 Am. Rep. 46, 9 Am. & Eng. R. Cas. 90; *Vaughan v. Providence & W. R. Co.*, 13 R. I. 578, 9 Am. & Eng. R. Cas. 41; *Wolf v. Hough*, 22 Kan. 659, 40 Am. & Eng. R. Cas. 136; *Schneider v. Evans*, 25 Wis. 241, 3 Am. Rep. 56; *Loewenberg v. Arkansas & La. R. Co.*, 56 Ark. 439, 19 S. W. 1051."

Where the first and last carrier are independent carriers, and have between themselves no contract relation, and the bill of lading issued by the former is silent as to any contract to ship the goods as "released" or at a reduced rate, and the last carrier pays charges and earns freight without notice of any contract outside of the bill of lading, the latter's right to hold the goods for payment of the charges advanced and freight earned, on the basis of ordinary rates, is not affected by such secret contract. So held in *Georgia R. & B. Co. v. Murrah*, 85 Ga. 343, 11 S. E. 779.

Rights of Terminal Carrier Not Affected by Private Arrangements between Consignee and Intermediate Carrier.—In *White v. Vann*, 25 Tenn. (6 Humph.) 69, it is held, that a common carrier may pay and recover from the consignee or owner existing charges on the goods, especially if the general forwarding agents, with whom the contract of carriage was made, were also the special agents of the owner for the shipment of goods; and no private arrangement between the consignee and such agents, or any intermediate carrier, in reference to the freight, will affect the right to recover.

Initial Carrier's Guaranty as to Total Amount of Charges.—In *Schneider v. Evans*, 25 Wis. 241, 3 Am. Rep. 56, it appeared that a railroad company stipulated against responsibility as a carrier of certain goods beyond its own line, but guaranteed that cost of transportation should not exceed a certain sum, which was less than the aggregate of the charges on the several connecting lines, between the point of shipment and the destination of the goods,

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at the usual rates, the connecting carriers having no knowledge or notice of the guaranty. It was held, that each carrier, after the first, might charge, and pay back charges at the usual rates; and that the last carrier, or the warehouseman who received from it and paid back charges, had a lien on the goods for the total amount of such charges.

Special Directions from Consignee.—A terminal carrier, receiving goods in good faith, and in the usual course of business between connecting lines, without notice of any special directions on part of the consignee, will have a lien for his reasonable charges, and also for customary charges advanced the first carrier. So held in *Denver & R. G. Co. v. Hill*, 13 Colo. 35, 21 Pac. 914, 40 Am. & Eng. R. Cas. 145, 42 L. R. A. 376.

Rate Less than Schedule Rate Quoted by Initial Carrier by Mistake.—A common carrier who has complied with the terms of the interstate commerce act in respect to providing and keeping the existing schedule of rates is not precluded from collecting from a shipper the full schedule rate, because by mistake a less rate was named to him by the carrier at the point of shipment and also inserted in a bill of lading signed both by the carrier and the shipper; no fraud or willful deception having been practiced or attempted; and on discovery of the mistake, after the shipment but in time to correct it at the point of destination, it may be there corrected by the exaction of the full schedule rate and payment of the same by the shipper, he being also the consignee, as a condition to surrendering the goods to him; and should he refuse to so comply with the condition, the detention of the goods by the carrier to enforce payment of the correct charges is no conversion. So held in *Savannah, F. & W. R. Co. v. Bundick*, 94 Ga. 775, 21 S. E. 995.

Through Shipment—Failure of Preceding Carrier to Note a Lien on Bill of Lading.—When the shipment is clearly a through shipment, the fact that new bills of lading may have been issued by one or more of the preceding carriers or that a shipping clerk failed to note a lien on the bills but did note the charges, will not serve to discharge the lien of the terminal carrier for freight bills paid by it to previous connecting carriers. So held in *Evans & Hollinger v. Chicago & A. R. Co.*, 76 Mo. App. 472.

Misrouted—Charges Increased.—Where the carrier which issues the bill of lading is authorized to stipulate that the last carrier will transport the freight over its line at a given rate, and the first or a succeeding carrier misroutes the freight, so that when it reaches the last carrier it is burdened with charges for carriage over another line which the owner of the goods had not agreed to pay, that does not prevent the last carrier from maintaining possession of the goods to protect his lien for all lawful charges against them. So held in *Crossan v. New York, etc., R. Co.*, 149 Mass. 196, 21 N. E. 367, 40 Am. & Eng. R. Cas. 136.

Destination Changed by Error of Intermediate Carrier.—In *Vaughan v. Providence & W. R. Co.*, 13 R. I. 578, 9 Am. & Eng. R. Cas. 41, it appeared that cotton was forwarded from Louisiana to be delivered in P., R. I., "rates guaranteed to P."; but that by the error of some intermediate carrier, the destination, P., was changed to C., Mass.; whence, by the owner's direction, the P. & W. R. Co., after paying charges, brought it to P.; and that the owner refused to refund to the P. & W. R. Co. its charges for freight paid, and replevied the cotton. It was held, that the P. & W. R. Co. had a lien on the cotton for its freight and charges for the back freight paid by it.

Mistake of Initial Carrier in Routing.—In case of a mistake by the first carrier in routing the goods, the terminal carrier will have a lien upon them for the freight earned by it, unless it had notice of the route and the lines of road over which the goods were to be trans-

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ported. *Bird v. Georgia Railroad*, 72 Ga. 655, 27 Am. & Eng. R. Cas. 39.

Misrouted by Preceding Carrier.—In *Price v. Denver & R. G. R. Co.*, 12 Colo. 402, 37 Am. & Eng. R. Cas. 626, 21 Pac. 188, it is held that a railroad which receives goods consigned to a point on its line, in the usual course of business, from a connecting carrier, which has carried the goods to its terminus, is entitled to its reasonable freight charges, though the consignor had directed that the goods should be carried from the terminus of the first carrier to their destination by another carrier than the one to which they were delivered, where there is no evidence that the latter knew of such direction.

Same—Illegal Contract between Carriers.—But where the initial carrier delivers the goods to a different and competing line, in willful violation of the shipping directions, and in pursuance of an illegal contract existing between the first carrier and the one to whom the goods were delivered by it, the latter is not entitled to a lien on the goods for transportation and back charges, although it may not have had notice of the shipping directions when it received the goods. So held in *Denver & R. G. R. Co. v. Hill*, 13 Colo. 33, 21 Pac. 914, 40 Am. & Eng. R. Cas. 145, 4 L. R. A. 376.

Failure to Deliver Money in Time—Negligent Carrier's Charges Advanced by Express Company.—Where an express company received a package of money to be carried to the end of its line, and from there to be forwarded by another company, through whose delay it did not reach its destination until the consignee had left, and the consignor ordered its return, and the express company advanced the charges of the other company, it was held, that the express company had a lien on the package after its return for its reasonable charges and advances made. *United States Express Co. v. Haines*, 69 Ill. 137.

Only Care of Prudent Man Required of Terminal Carrier.—To entitle a common carrier to claim his lien for money paid for previous charges on the carriage of the goods, the law imposes on him nothing beyond what a prudent man would, under like circumstances, have done in the discreet management of his own business. So held in *Slipher v. Fisher*, 10 Ohio 299, 303.

Terminal Carrier Not Required to Assume Burden of Another's Controversy.—In *St. Louis, I. M. & S. R. Co. v. Lear*, 54 Ark. 399, 55 Am. & Eng. R. Cas. 415, 15 S. W. 1030, it is said in the opinion: "But as the prior carrier will not deliver the property without payment of its charges, or what is the same thing, an agreement by the succeeding carrier to pay them, such succeeding carrier cannot be expected or asked to receive it except in cases where it is authorized to pay the charges. It could not be asked to assume the burden of another's controversy; and if such conditions were imposed, each line would make its own contracts, and thus interrupt the course of transit, to the expense, annoyance and inconvenience of shippers and the public. But the law does not exact this, and is satisfied when the carrier exercises reasonable care and a just regard for the interests of the shipper. *Bissell v. Price*, 16 Ill. 409; *Guesnard v. Louisville & N. R. Co.*, 76 Ala. 453, 23 Am. & Eng. R. Cas. 691; *Bowman v. Hilton*, 11 Ohio 303; *Jones on Liens*, § 289."

Connecting Carrier Not Required to Delay Freight to Make Inquiries.—In *Glover v. Cape Girardeau & So. R. Co.*, 95 Mo. App. 369, 374, 4 R. R. R. 319, 27 Am. & Eng. R. Cas. N. S., 319, it is said in the opinion: "It is not the custom, nor does the law require a connecting carrier to whom goods are offered by another carrier to be forwarded, to delay the reception or the forwarding of the goods until he can ascertain whether or not the shipper and the initial carrier stipulated the terms of shipment, and if so what those terms are; or if no terms were stipulated then whether or not the initial carrier had in all things faithfully and honestly discharged

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his duty as an implied agent of the shipper in forwarding the goods."

Terminal Carrier Required to Ascertain Condition of Goods and Reasonableness of Charges.—But in *Bissell v. Price*, 16 Ill. 409, it is said in the opinion: "While the warehouseman or carrier is authorized to advance for, and on account of the consignee, previous charges upon the goods, he is bound to act in good faith towards, and carefully watch the interests of the owner, whoever he may be. He is bound to do this to the same extent that a prudent man would were he present, and acting for himself. He must see that the goods are in apparent good order, as described in the previous bill of lading, or, if not, use reasonable exertions to ascertain how they became damaged and the party liable therefor. So, also, to the same extent, he must see that the previous charges are reasonable before he is authorized to pay them."

Terminal Carrier Entitled to Time to Make Inquiry.—Where the terminal carrier is not a party to the contract between the initial carrier and the shipper, it is entitled to a reasonable time within which to make inquiry concerning such contract. So held in *Illinois Cent. R. Co. v. Brookhaven Machine Co.*, 71 Miss. 663, 16 So. 252.

Contra.—In *Travis v. Thompson* (N. Y.), 37 Barb. 236, it is held, that where an intermediate or terminal carrier pays to a previous carrier the amount claimed by him, without knowledge of a payment having been made by the consignor, to the initial carrier, on account of the freight, at the commencement of the voyage, he cannot recover of the consignee the amount of such previous payment.

d. Through Rate—Unauthorized Contracts.

And a subsequent connecting carrier is not bound by an unauthorized contract of the initial carrier purporting to guarantee a through freight rate.

Georgia.—*Bird v. Georgia Railroad*, 72 Ga. 655, 27 Am. & Eng. R. Cas. 39.

Kansas.—*Wolf v. Hough*, 22 Kan. 659, 40 Am. & Eng. R. Cas. 136.

Kentucky.—*Thomas v. Frankfort & C. R. Co.*, 116 Ky. 879, 76 S. W. 1093, 9 R. R. 842, 32 Am. & Eng. R. Cas., N. S., 842.

Louisiana.—*Walker v. Cassaway*, 4 La. Ann. 19, 50 Am. Dec. 551.

Mississippi.—*Illinois Cent. R. Co. v. Brookhaven Machine Co.*, 71 Miss. 663, 16 So. 252.

Missouri.—*Armstrong v. Chicago, St. P., etc., Ry. Co.*, 62 Mo. App. 630; *Wells v. Thomas*, 27 Mo. 17, 72 Am. Dec. 228.

South Carolina.—*Lewis v. Richmond & D. R. Co.*, 25 S. Car. 249.

Tennessee.—*Sumner v. Southern R. Assoc.*, 66 Tenn. (7 Baxt.) 345, 9 Am. & Eng. R. Cas. 18; *White v. Vann*, 25 Tenn. (6 Humph.) 69.

Texas.—*San Antonio, etc., R. Co. v. Clements*, 20 Tex. Civ. App. 498, 49 S. W. 913.

Washington.—*Moses v. Port Townsend, etc., R. Co.*, 5 Wash. 595, 32 Pac. 488, 55 Am. & Eng. R. Cas. 418.

Wisconsin.—*Schneider v. Evans*, 24 Wis. 241, 3 Am. Rep. 56.

In *Illinois Cent. R. Co. v. Brookhaven Machine Co.*, 71 Miss. 663, 16 So. 252, it is held, that where a contract is made with the initial carrier for through shipment of goods at a fixed freight rate, but, in violation of this, it makes a greater charge and delivers the goods to a connecting carrier, with a way bill showing the higher rate, the connecting carrier is not bound by the contract, but if it carries the goods without advancing the charges of the initial carrier, the contract amount being sufficient to pay its own charges, it should make delivery on receipt of such amount, after deducting its charges therefrom, and account for any balance to the initial carrier.

Where a carrier receives goods for shipment over several con-

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in whose hands it was done, or under his original contract of shipment."

Injured Horses Received by Permission of Shipper.—A shipper who is present and permits a carrier to receive his horses from a prior carrier and pay advance charges, so as to have a lien therefor, cannot recoup damages done to the horses by the prior carrier against such lien, though the connecting carrier knew of the injuries, and that the shipper intended to demand compensation from the prior carrier. So held in *St. Louis, I. M. & S. R. Co. v. Lear*, 54 Ark. 399, 55 Am. & Eng. R. Cas. 415, 15 S. W. 1030.

Damaged Goods Sold by Terminal Carrier at Owner's Request.—Where goods purchased by defendant were damaged in transit through the negligence of a railroad company, and refused by him on their delivery by a connecting line, which, at defendant's instructions, sold them to third parties, the connecting line was entitled to retain its freight charges out of the proceeds of the sale. So held in *Gulf, etc., Ry. Co. v. Browne*, 27 Tex. Civ. App. 437, 66 S. W. 341.

2 GOODS RECEIVED FROM ONE NOT ENTITLED TO DELIVER THEM TO THE CARRIER.

A common carrier who accepts goods for transportation from a wrongful holder, or one not entitled to ship them or otherwise control them, can acquire no lien upon them for its freight or other charges as against the owner of the goods, even though the carrier acted in good faith, and was not in fault.

United States.—*Marsh v. Union Pac. R. Co.*, 3 McCrary (U. S.) 236, 6 Am. & Eng. R. Cas. 359, 9 Fed. Rep. 873.

California.—*Hayes v. Campbell*, 63 Cal. 143.

Massachusetts.—*Clark v. Lowell & R. Co.*, 75 Mass. (9 Gray) 231; *Gilson v. Gwinn*, 107 Mass. 126, 9 Am. Rep. 13; *Robinson v. Baker*, 5 Cush (Mass.), 137, 51 Am. Dec. 54; *Stevens v. Boston & W. R. Corp.*, 74 Mass. (8 Gray) 262; *Whitney v. Beckford*, 105 Mass. 267.

Michigan.—*Fitch v. Newberry*, 1 Dougl. (Mich.) 1, 40 Am. Dec. 33; *Pingree v. Detroit, L. & N. R. Co.*, 66 Mich. 143, 33 N. W. 298.

New York.—*Bassett v. Spofford*, 45 N. Y. 387, 6 Am. Rep. 106.

Rhode Island.—*Vaughan v. Providence & W. R. Co.*, 13 R. I. 578, 9 Am. & Eng. R. Cas. 41.

Texas.—*Liefert v. Galveston, etc., Ry. Co.* (Tex. Civ. App.), 57 S. W. 899.

A carrier acquires no right, by virtue of its employment, to hold goods delivered to it by a wrongdoer, to whom they do not belong, until the freight charges are paid, against the claim of the true owner; nor has the carrier any lien on the goods for the transportation charges. So held in *Savannah, etc., R. Co. v. Tolbert* (Ga.), 18 R. R. 288, 41 Am. & Eng. R. Cas., N. S., 288, 51 S. E. 401.

In *Robinson v. Baker*, 5 Cush (Mass.) 137, 51 Am. Dec. 54, it is held, that a common carrier who accepts goods for transportation from one not entitled to control them, has no lien upon the goods for his freight as against the owner; and it will make no difference that the carrier acted in good faith, and was not in fault.

A carrier who receives goods from a wrongdoer, without the consent of the owner, has no right to detain them, against the owner, for the payment of freight; as no man's property can be lawfully taken from him without his consent. So held in *Robinson v. Baker*, 5 Cush (Mass.) 137, 51 Am. Dec. 54.

In *Stevens v. Boston & W. R. Corp.*, 74 Mass. (8 Gray) 262, it is held, that a carrier receiving goods from a wrongdoer has no lien thereon against the owner even for freight which he has paid to a previous carrier, by whom the owner had directed them to be carried.

Wharfinger without Authority to Forward Goods.—In *Clark v. Lowell & L. R. Co.*, 75 Mass. (9 Gray) 231, it is held, that a carrier who has received goods from a wharfinger, with whom they have

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been deposited by their owner without authority to forward them, has no lien on them for freight against the owner.

Chattel Carried for Bailee.—In *Gilson v. Gwinn*, 107 Mass. 126, 9 Am. Rep. 13, it is held, that a carrier who transported a chattel at the sole request and for the sole convenience of a bailee thereof had no lien on it for freight, as against the owner.

Goods Transported for Agents Exceeding Authority—Carrier Put upon Inquiry.—In *Hayes v. Campbell*, 63 Cal. 143, it appeared that a carrier received from a firm of commission merchants in San Francisco wheat belonging to plaintiff for transportation to Europe; that the wheat was received under a contract with the firm in their own name, but in the course of a business which the carrier knew or had reason to believe was conducted by them merely as agents; that plaintiff had consigned the wheat to the firm with special instructions, and in delivering the same to the carrier under the contract referred to they exceeded their authority; that the firm failed, and on inquiry subsequently made, plaintiff ascertained the terms and conditions of the contract with the carrier, and thereupon demanded the wheat, which the carrier refused to deliver, repudiating plaintiff as the owner, and claiming a lien upon the wheat for charges arising under the contract; and that as to a large portion of these charges, the firm had no authority to bind the plaintiff, and no payment or tender was made by him. It was held, that the carrier was put upon inquiry as to the agency and the authority of the firm; that plaintiff was not bound by the contract, and that no payment or tender was required before commencing action of replevin to recover the wheat.

Wrongfully Delivered by Railroad to Steamship Company, Instead of Owner.—In *Liefert v. Galveston, etc., R. Co.* (Tex. Civ. App.), 57 S. W. 899, it is held, that where goods were wrongfully delivered by a carrier to a steamship company instead of the owner, and were transported by the latter to another place, the company, having had notice of the ownership, had no lien on the goods for freights; and in selling them was liable for conversion.

Consignee's Ownership—His Conditional Refusal to Honor Draft—Delivery of Bill of Lading.—But where the consignor attaches to the bill of lading a draft at twenty days, which the consignee refuses to honor unless the demurrage charges are adjusted by the consignor, and the consignor, on being advised to that effect, directs the immediate delivery of the bill of lading, the consignee is invested with title, which will support a lien for freight charges incurred by him. So held in *Hoffman v. Lake Shore & M. S. R. Co.*, 125 Mich. 201, 84 N. W. 35.

Freight Earned before Goods Declared Forfeited by Government—Carrier without Knowledge of Offense.—And in *Six Hundred Tons of Iron Ore* (D. C.), 9 Fed. Rep. 595, it is held, that where freight is earned before the government makes its election whether to declare the merchandise, of which a false and fraudulent entry has been made, forfeited or to recover its value by suit against the parties making the entry, and the former proceeding is finally chosen and the property is sold, such freight must be paid out of the proceeds of the sale, the owners of the vessel having no knowledge before it was earned of any offense committed or premeditated.

Goods Fraudulently Purchased—Rescission of Sale.—And the vendor of goods fraudulently purchased cannot, by rescission, defeat the lien of a railroad company for freight charges accruing to it under contract entered into in good faith with the vendee. So held in *Hoffman v. Lake Shore & M. S. R. Co.*, 125 Mich. 201, 84 N. W. 55.

Misrouted by Preceding Carrier.—And where goods are wrongfully sent to the terminal point by a route other than that selected by the shipper, if the terminal carrier knew of the shipper's direction as to the route when it received them, it would have no lien on the goods

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for freight charges. So held in *Bird v. Georgia Railroad*, 72 Ga. 635, 27 Am. & Eng. R. Cas. 39.

3. GOODS RECEIVED FROM ONE HAVING APPARENT AUTHORITY.

But where the carrier receives the goods from a party who, by the owner's act, is clothed with apparent authority to control them, it may acquire a lien upon them against the owner for freight and other charges. *Vaughan v. Providence & W. R. Co.*, 13 R. I. 578, 9 Am. & Eng. R. Cas. 41.

False Representations by Initial Carrier—Bill of Lading—Privilege of Reshipping.—In *Walker v. Cassaway*, 4 La. Ann. 19, 50 Am. Dec. 551, it is held that where the master of a steamer, by false representations, induces an agent of a third person to ship merchandise on his boat at a certain freight, and the bill of lading states that the goods are taken "with the privilege of reshipping," and the freight is reshipped on another boat and carried to the port of its destination, the owner of the goods cannot require their delivery before paying the freight due to the boat on which it was reshipped, where the contract by the master of the second boat was made in good faith, at a reasonable rate, with a party who held possession apparently fair, under a bill of lading authorizing reshipment.

4. GOODS WRONGFULLY DIVERTED BY THE CARRIER.

Where the goods were wrongfully diverted by the carrier, it is not entitled to a lien upon them for freight or other charges. *Marsh v. Union Pac. R. Co.*, 3 McCrary (U. S.) 236, 6 Am. & Eng. R. Cas. 359, 9 Fed. Rep. 873; *McCullough v. Hellwig*, 68 Md. 269, 7 Atl. 455; *Liefert v. Galveston, etc., R. Co.* (Tex. Civ. App.), 57 S. W. 899.

Rationale of Rule.—Where goods are sent by a route other than the proper one under the contract with the owner, there is no lien for freight money, and if they are held under a claim of lien, an action of trover against the carrier will lie for their value; as to allow a lien in a matter to which the owner has not assented, would divest him of his property to the extent of the lien without his consent. So held in *Marsh v. Union Pac. R. Co.*, 9 Fed. Rep. 873, 3 McCrary (U. S.) 236, 6 Am. & Eng. R. Cas. 359.

Agreement to Carry to Certain Port—Performance Essential to Existence of Lien.—In *Bass & Co. v. Upton*, 1 Minn. 408, it is held, that where a steamboat in the carrying trade receives goods and contracts to carry them to a place stated, no liens attaches to the goods in favor of the boat until the contract is performed, unless it appears that the performance of the contract became impracticable.

Discharge of Cargo at Wrong Wharf.—Where, under the bill of lading, the cargo is to be delivered at a certain wharf, the owner of the vessel, having discharged the cargo at another, had no special property therein, by reason of the nonpayment of freight, as would defeat an action of replevin for the cargo brought by its owner. So held in *McCullough v. Hellwig*, 68 Md. 269, 7 Atl. 455.

Refusal to Pay More than Agreed Amount—Cargo Landed at Wrong Dock.—In *Johnston v. Davis*, 60 Mich. 58, 28 N. W. 830, it appeared that the master of a vessel agreed to deliver property at a specified dock in a certain city, for \$100; that on arriving at the dock, he demanded \$150, and \$9 dockage, and refused to deliver the property until payment of said sums; and that the owners of the property offered to pay the \$100 and the dockage charges, which offer was refused, and the master landed the property at another dock in the city, instructing the custodian not to deliver the same to the owners except on payment of the \$150. It was held, that because of the failure of the master to perform his contract, no lien attached to the property for the sum agreed to be paid.

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5 CLAIM AGAINST THE CARRIER FOR INJURIES TO THE GOODS.

The carrier's lien is only coextensive with the right to claim and recover freight, and where the carrier is liable to the owner or consignee to an amount equal to or greater than the freight charges, on account of injuries to the goods, it is not entitled to a lien upon them. *Burd v. Georgia Railroad*, 72 Ga. 655, 27 Am. & Eng. R. Cas. 39; *Adams v. Clark*, 63 Mass. (9 Cush.) 215, 57 Am. Dec. 41; *Jones v. Boston & A. R. Co.*, 63 Me. 188; *Pearce v. Wabash R. Co.*, 89 Mo. App. 437; *Travis v. Thompson* (N. Y.), 37 Barb. 236; *Isham v. Greenham*, 1 Handy (Ohio) 357; *Moran Bros. Co. v. Northern Pac. R. Co.*, 19 Wash. 266, 53 Pac. 49; *Miami Powder Co. v. Port Royal & W. C. Ry. Co.*, 47 S. Car. 324, 25 S. E. 153.

South Carolina Decisions Reconciled.—In *Miami Powder Co. v. Port Royal & W. C. R. Co.*, 47 S. Car. 324, 25 S. E. 153, it is held, that for damages to freight, by fault of the carrier, the owner may sue the carrier for damages, when the damages equal or exceed the freight, without first paying the freight charges, and where the damages equal or exceed the freight, he may maintain an action for claim and delivery of the goods without first paying the freight charges. In this case it is said in the opinion: "This case (*Ewart v. Kerr*, Rice 203) has never been expressly overruled, but it is argued that this court, in *Miami Powder Co. v. Port Royal and Western Carolina Railway Co.*, 38 S. C. 78, announced principles in conflict with it. Mr. Justice Poke, delivering the opinion in this case, said, after stating plaintiff's contention: 'This court is relieved of an extended consideration of these propositions of law, because this precise point was considered by the court of appeals years ago, in the case of *Ewart v. Kerr*, Rice 203, *McMull* 141, and in that case it was decided by a divided court, that if the property of plaintiff was damaged, while in the care of the common carrier, to a greater extent than the bill of freight, the lien of the latter was extinguished, and the consignee not only had the right to demand the property of the carrier without payment of freight charges, but that such retention by the common carrier after the demand made, amounted to a conversion, and that an action of trover would lie. It must be observed, that in order for the principles established in *Ewart v. Kerr*, supra, to apply, the damage to the property, while in the hands of the common carrier, must be equal to or greater than the freight charges. There is no evidence establishing this fact in the case at bar, and the charge of the circuit judge, in response to the request to charge of the defendant, appellant, failed to place this essential element before the jury.' It is obvious from the above quotation that the court did not only not overrule, but distinctly reaffirmed the doctrine of *Ewart v. Kerr*. It is true, and without attempting to explain by hair-splitting distinctions, we frankly confess that there follow the above quotation expressions that may mislead as to the opinion of the court concerning *Ewart v. Kerr* as authority. These expressions, quoted as tending to impeach the doctrine established in *Ewart v. Kerr*, must be taken and were meant to be taken, as words of caution merely, in view of the practical difficulties in the way of establishing the facts necessary to be established in the application of the doctrine."

Where a common carrier became liable to the owner of goods for damage they sustained in transit, to an amount larger than the freight charges, and the carrier refused to deliver them until the freight charges were paid, such detention was unlawful, as the carrier's lien was only coextensive with the right to claim and recover freight. So held in *Dyer v. Grand Trunk R. Co.*, 42 Vt. 441, 1 Am. Rep. 350.

In an action of replevin, against a carrier claiming the right to retain goods until the freight is paid, it is competent for the owner to prove damages to them in their transit, in order to reduce the amount

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of freight actually due, or to show that nothing is due, thereby showing that defendant had no right to the possession of the goods *Bancroft v. Peters*, 4 Mich. 618; *Baggs & Russell v. Martin*, 13 B Mon. (Ky) 239.

In *Moran Bros. Co. v. Northern Pac. R. Co.*, 19 Wash. 266, 52 Pac. 49, it is held, that where a carrier has subjected itself to liability for damages in respect to the goods carried, equal to the amount of the freight, the consignee may maintain replevin without a tender of the freight charges.

Authorities Reviewed.—In *Dyer v. Grand Trunk Ry. Co.*, 42 Vt. 441, 1 Am. Rep. 350, it is said in the opinion: "The case of *Humphreys v. Reed*, 6 Wharton 435, embodies a principle which, in its legitimate results and applications, would seem to warrant the replevin in the case like the present. In that case the carrier delivered the goods to a wharfinger, with directions not to deliver them to the consignee till the freight should have been paid. The consignee called on the wharfinger for the goods, and was told by him what his instructions were. Thereupon, he insisted to the wharfinger that the goods had been damaged in the transportation, through the fault of the carrier, to an amount exceeding the price of the freight, and that he had a right to have the goods without paying the freight, and the wharfinger delivered them to him. Thereupon the carrier sued the wharfinger in trover for the goods, relying on his lien for the freight. The defense set up was the damage to the goods, and it was held, that such damage being shown, he had no right to claim the payment of the freight of the consignee, and of course no right to hold the goods himself or authorize another to hold them for him as against the consignee, and he was defeated in the action. It is true that some fifty years ago it was held in England that such damage could not be set up in defense, in whole or in part, to a claim for freight, when the goods had been delivered. But that doctrine has been discarded in this country, and a contrary doctrine established. See *Snow v. Carruth, Sprague, J.*, Dis. Ct. Mass., 19 Law Rep. 198; also, *Humphreys v. Reed* (6 Wharton 435), which overruled *Davidson v. Grozme*, 12 East 380, and *Shields v. Davies*, 6 Taunt., 65."

Local Carrier's Lien under Ordinance.—In *Browning v. Bedford* (N. Y. Sup. Ct.), 82 N. Y. Supp. 489, it is held, that a cartman is entitled to no lien for freight charges under an ordinance, where the goods, while being transported by him were damaged to an amount in excess of such charges.

V. PRIORITY OF CARRIER'S LIEN.

Superior to Creditor's Claims.—The carrier's lien upon goods in its possession in its capacity as a common carrier is superior to the claim of any creditor of their owner or consignee. *Faith v. East India Co.*, 4 Barn & Ald. (Eng.) 630; *Rucker v. Donovan & Feiferlich*, 13 Kan. 251, 19 Am. Rep. 84; *Newhall v. Vargas*, 15 Me. 314, 33 Am. Dec. 617; *Cooley v. Minnesota Trans. R. Co.*, 53 Minn. 327, 55 N. W. 141, 55 Am. & Eng. R. Cas. 616; *Wolfe v. Crawford*, 54 Miss. 514; *Lake Superior El. R. Co. v. Long Island R. Co.* (N. Y. Sup. Ct.), 1 Misc. Rep. 669.

Rights of Vendor.—The lien of the carrier for charges for carriage of the specific articles is superior to the rights of the vendor, and the carrier may insist upon retaining possession until they are paid. So held in *Rucker v. Donovan & Feiferlich*, 13 Kan. 251, 19 Am. Rep. 84.

Conditional Sale—Carrier's Lien Superior to Claim of Vendor—Rationale of Doctrine.—In *Lake Superior El. R. Co. v. Long Island R. Co.* (N. Y. Sup. Ct.), 1 N. Y. Misc. Rep. 669, it is held, that where locomotives are sold upon a condition precedent of payment before title shall vest, and they are delivered to the vendee to take to its railroad for use, the vendor cannot, upon the vendee's default in pay-

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ment, reclaim them from the carrier, by whom they were transported to their destination, unless the vendor first pays the carrier's lien for freight. In this case it is said in the opinion: "The vendor intended that the locomotives were to be transported to the place where they were to be used, the same as he intended they should be kept in repair and delivered them for that purpose. If they had been repaired by a mechanic he would have had a lien on them which, it seems to me, would have been good against the vendor. I do not see why the vendant's lien as carrier is not good on the same principle. After authorizing the vendee to ship the engines, and use them, and have them repaired when necessary, the vendor is estopped from disputing the carrier's or repairer's lien. To say that the giving of such authority did not contemplate or extend to the giving of credit for freight or repairs, but only to payments in advance, would be contrary to the universal course of business. The law presumes according to the usual order of things."

Attachment by Creditor of General Owner.—A creditor of the general owner of goods cannot, by attachment against the latter, take from a common carrier the goods shipped by the owner, while in transit to the consignees, without first paying to the carrier the freight and his other legal charges. So held in *Wolfe v. Crawford*, 54 Miss. 514.

Superior to Pledgee's Claim.—The lien of the carrier and warehouseman for keeping the property is superior to that of a pledgee who had procured the property to be transported and stored. So held in *Cooley & Minnesota Trans. R. Co., 53 Minn. 327, 55 N. W. 141, 55 Am. & Eng. R. Cas. 616.*

Levee Charges Advanced by Carrier—Lien Superior to Claims of Creditor of Cotton.—Where a charge is imposed by the bill of lading on cotton shipped upon a steamer, to be collected from the consignees, for reimbursement to the master of the steamer for money advanced to pay the levee taxes on the cotton and responsibility for goods delivered to the shipper, the common carrier acquires, by the delivery of the cotton to him, a qualified right or title which he can assert as claimant against a creditor of the cotton while it is in transit. So held in *Wolfe v. Crawford*, 54 Miss. 514.

Vendor's Right of Stoppage in Transitu Superior to Carrier's Lien for General Balance.—But the vendor's right of stoppage in transitu is paramount to all liens against the vendee, even to a lien in favor of the carrier, existing by usage, for a general balance due him from the consignee. So held in *Farrell v. Richmond & D. R. Co., 102 N. Car. 390, 9 S. E. 302.*

Goods Received from Mortgagor—Carrier's Lien Inferior to Mortgage.—And in *Owen v. Burlington, etc., R. Co. 11 S. Dak. 153, 76 N. W. 302*, it is held, that the lien of a carrier for freight charges on property received from a mortgagor in possession with the right to remove from place to place is inferior to that of a mortgage of which the carrier had both constructive and actual knowledge.

Contract Lien for Arrearages of Freight Inferior to Right of Stoppage in Transitu.—And in *Farrell v. Richmond & D. R. Co., 102 N. Car. 390, 9 S. E. 302*, it appeared that a vendor shipped a safe to his vendee, taking therefor a bill of lading in which was the clause: "The several carriers shall have a lien upon the goods for all arrearages of freight and charges due by the same owners or consignees on other goods." It was held, that such stipulation did not give the carrier such a lien on the safe for arrearages of freight, due by the consignee on other goods, superior to the consignor's right of stoppage in transitu.

Warehouseman's Lien Superior to Carrier's.—And in *Powers & Co. v. Sixty Tons of Marble, 21 La. Ann. 402*, it is held, that where a carrier of freight for hire stores goods transported by it in a warehouse at the port of destination, the charges of the warehouseman for

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storage is a lien on the goods superior in rank to that of the carrier for freight.

VI. DISCHARGE AND WAIVER OF LIEN.

1. LOST BY DELIVERY.

a. General Rule.

The carrier loses its lien by unconditionally delivering the goods to the consignee.

England.—*Forth v. Simpson*, 13 Q. B. 689; *Skinner v. Upshaw*, 2 Ld. Raym 752; *Sodergreen v. Flight*, 6 East 662.

Alabama.—*Long v. Mobile & M. R. Co.*, 51 Ala. 512.

California.—*Wingard v. Banning*, 39 Cal. 543.

Illinois.—*Gregg v. Illinois Cent. R. Co.*, 147 Ill. 550, 61 Am. & Eng. R. Cas. 216, 35 N. E. 343.

Iowa.—*Reineman & Co. v. Covington, C. & B. H. R. Co.*, 51 Iowa, 338, 1 N. W. 619.

Kentucky.—*Boggs v. Martin*, 52 Ky. 239.

Massachusetts.—*Sears v. Wills*, 86 Mass. 212.

New Jersey.—*Lembeck v. Jarvis Terminal Cold Storage Co.* (N. J. Ch.), 59 Atl. 360.

New York.—*Bigelow v. Heaton*, 4 Denio (N. Y.) 496; *Geneva, etc., R. Co. v. Sage* (N. Y. Sup. Ct.), 35 Hun 95; *McFarland v. Wheeler*, 26 Wend. (N. Y.) 467.

North Carolina.—*Norfolk & Southern R. Co. v. Barnes*, 104 N. Car. 25, 10 S. E. 83.

Pennsylvania.—*Lake Shore & M. S. R. Co. v. Ellsey*, 85 Pa. St. 283.

Vermont.—*Bailey v. Quint*, 22 Vt. 474.

Presumption That Charges Have Been Paid.—When property has been delivered by a common carrier to the consignee, the presumption is that the latter has paid the carrier's charges. So held in *Shea v. Minneapolis, etc., Ry. Co.*, 63 Minn. 228, 65 N. W. 458.

Cargo Delivered without Suggestion of Intent to Rely upon Lien.—In *Sears v. Wills*, 86 Mass. 212, it is held, that if a cargo subject to a lien for freight by an express provision in the charter party is delivered unconditionally, upon the bills of lading, and the larger portion thereof, with the knowledge and consent of all parties, is discharged into a ship bound for a foreign port, and there is no suggestion of any intention to rely upon the lien, the lien is thereby waived.

Implied Intent to Waive and Completion of Carrier's Contract Essential.—To constitute a waiver of its lien by a carrier, delivery must be made with such intent, or it must be made under such circumstances that the law will presume the intent to have existed, and nothing must remain to be done by the carrier in order to fully perform its contract. So held in *New York Cent. & H. R. Co. v. Davies* (N. Y. Sup. Ct.), 86 Hun 86, 34 N. Y. Supp. 206.

Effect of Uncommunicated Intention of Carrier.—But whether the carrier's lien upon goods transported by it is waived or not by a delivery does not depend upon the intention of the carrier, or his agent by whom the delivery is made if it is not communicated to the consignee and agreed to by him. So held in *Bigelow v. Heaton*, 4 Denio (N. Y.) 496.

Horse Left in Car Over Night by Permission, and Taken Away Next Morning—Subsequent Dispute as to Charges.—In *Geneva, etc., R. Co. v. Sage* (N. Y. Sup. Ct.), 35 Hun 95, an action of replevin to enforce a lien for freight upon a horse consigned to defendant, it appeared that the car containing the horse arrived at the depot late at night; that defendant upon being informed of its arrival by telephone asked if the horse could remain in the car until morning and was informed that it could; and that in the morning defendant's servant went to the station and took the horse away. Subsequently,

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Possession of Warehouseman as That of Carrier.—In *Compton v. Shaw* (N. Y. Sup. Ct.), 1 Hun 441, it is held, that a warehouseman, with whom goods, on which freight charges are unpaid, is stored by a common carrier, and who, without the consent of the common carrier, delivers the property to the consignee, is liable to the common carrier for the amount of its charges, as the carrier was, in law, in the possession of the goods, and the warehouseman, by delivery to the consignee, was guilty of a conversion.

Where a consignee is in default in not receiving goods, and, in consequence, the right is conferred upon the carrier to warehouse them, if the latter deposits them with a store-keeper, subject to its lien for freight, he does not thereby forfeit his lien. And in such case the store-keeper acts under the authority of the carrier, and the possession of the former is that of the carrier for the purpose of preserving its lien. And the effect is the same if the carrier, instead of depositing the goods for the owner, subject to his lien, deposit them in its own name. So held in *Western Transp. Co. v. Barber*, 56 N. Y. 544.

Warehouseman May Retain Possession for Railroad.—A warehouseman, with whom goods transported by a railroad company are stored, may retain possession of them, when so instructed by the railroad, until the back charges thereon are paid. So held in *Alden & Co. v. Carver*, 13 Iowa 253, 81 Am Dec. 430.

Carrier Holding Goods as Agent of Vendee.—In *Hall v. Dimond*, 63 N. H. 565, 3 Atl. 423, it is held, that the carrier's change of character into that of an agent to keep the goods for the buyer is not inconsistent with its right to retain the goods in its custody until its lien for freight is satisfied.

Delivery under Expectation of Payment.—In *One Hundred and Fifty One Tons of Coal (C. C.)*, Fed Cas. No. 10,520, it is held, that a delivery to the consignee made under an expectation that the freight will be paid at the time, is not such a delivery as parts with the carrier's lien, and the carrier may afterwards libel the goods in rem, in admiralty, for the freight.

Delivery Procured by Fraud—Promise to Pay Freight.—If the delivery of the goods by the carrier to the consignee be procured by the fraud of the latter, as if he falsely and fraudulently promise to pay the freight when the goods are received, the carrier's lien upon them continues, and it may bring replevin. So held in *Bigelow v. Heaton*, 4 Denio (N. Y.) 496.

Lien Retained by Agreement.—The carrier's lien upon goods transported by it for freight charges may be retained after their delivery to the consignee by the agreement of the parties. So held in *Heaton*, 4 Denio (N. Y.) 596.

b. Carriers by Water—What Constitutes Delivery.

In the case of *Bags of Linseed*, 1 Black (U. S.) 108, it is said in the opinion: "Courts of admiralty when carrying into execution maritime contracts and liens are not governed by the strict and technical rules of the common law, and deal with them upon equitable principles and with reference to the usages and necessities of trade. And it often happens that the necessities and usages of trade require that the cargo should pass into the hands of the consignee before he pays the freight. It is the interest of the shipowner that his vessel should discharge her cargo as speedily as possible after her arrival at the port of delivery, and it would be a serious sacrifice of his (the shipowner's) interests if the ship was compelled, in order to preserve the lien, to remain day after day, with her cargo on board, waiting until the consignee found it convenient to pay the freight, or until the lien could be enforced in a court of admiralty. The consignee, too, in many instances, might desire to see the cargo unloaded before he paid the freight, in order to ascertain whether all the goods mentioned in the bill of lading were on board, and not damaged by the fault of

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the ship. It is his duty, and not that of the shipowner, to provide a suitable and safe place on shore, in which they may be stored. Several days are often consumed in unloading and storing the cargo of a large merchant vessel, and if the cargo cannot be stored in the warehouse of the consignee without delay, it would seriously embarrass the ordinary operations of commerce, both as to the shipowner and the consignee.

Mere Manual Delivery—Cargo Discharged without Lien.—In *Six Hundred Tons of Iron Ore*, 9 Fed. Rep. 105, it is held, that manual delivery of the cargo by the consignee does not, of itself, necessarily operate to discharge the cargo for freight; that where the intent of the shipowner in such delivery is to discharge the cargo, and not to retain the lien for freight remains in full force.

The mere manual delivery of an article by a consignee, does not, of itself, operate necessarily to discharge the lien for the freight, but the delivery must be with the intent of parting with the lien. *One Hundred and Fifty Tons of Coal* (C. C.), Fed. Cas. No. 10,520.

Cargo in Bulk Delivered at Consignee's Place.—In *Gaughran v. One Hundred and Fifty-One Tons of Coal*, Fed. Cas. No. 5,273, it is held, that the lien in admiralty for cargo shipped in bulk is not lost by delivering the cargo at the consignee's place of business on land.

Cargo Piled in Yard of Purchaser—Refusal to Pay Freight—Lien Immediately Served.—In *Costello v. Cargo of Coal*, 44 Fed. Rep. 105, it appeared that a ship master delivered cargo to the direction of the consignee, who piled it in the yard of lading, which were received and piled in the yard of the purchaser, about 300 feet from the vessel, that after the discharge, demand was made for the freight, but the purchaser refused to pay. As to the amount, the purchaser refused to pay, and called for by the bill of lading; and that the master served notice that his lien for freight had never been abandoned, and afterwards seized the cargo under process in admiralty. It was held that the lien had not been abandoned.

Cargo on Dock Kept Separate from Other Goods—Demurrage Claim.—In *Pioneer Fuel Co. v. McBrier* (44 Fed. Rep. 495), it is held, that discharging cargo after a bill of lading is not a waiver of the lien, if the cargo is placed on the dock, and kept separate from other goods, so as to be capable of identification.

Bill of Lading Sent to Owner, and Part of Cargo Delivered to Him.—In *Boggs v. Martin*, 52 Ky. 239, it was held, that goods were forwarded to a commission merchant to be unloaded and placed on the wharf, and the bill of lading was sent to the owner, who removed part of the goods without the consent of the merchant. It was held, that there was not a delivery of all the goods, and that the lien for freight, unless it was so waived, was a question for the jury.

Warehouse Receipt Taken for Cargo.—A vessel, carrying cargo of flaxseed in a warehouse at the end of the wharf, took a receipt therefor, which was retained until the cargo was unloaded. It was held, that the vessel did not thereby lose her lien on the cargo for freight. *Davidson S. S. Co. v. Cargo of Flaxseed* (D. C.), 10 Fed. Rep. 105.

Refusal of Consignee to Accept—Stored Subject to Lien.—Where the goods are charged on the wharf and separated into their respective lots, and are not accepted by the consignee or owner, the carrier discharges himself from liability on his contract by storing them in a place of safety and notifying the consignee that they are stored, subject to the lien for freight and charges. So held in *The Eddy*, 72 U. S. 411.

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Cargo Discharged without Giving Notice of Lien—Property Removed from Wharf by Consignee—Delay in Filing Libel.—But in *Egan v. Cargo of Spruce Laths* (C. C.), 43 Fed. Rep. 480, it appeared that a cargo of laths, sold by the consignee to the claimant before arrival, was discharged without notice to claimant of any lien or claim for freight and demurrage, it being customary in the port of New York to discharge cargoes from canal boats before demanding freight and demurrage; and the laths, as fast as they were discharged, were received by the claimant, and transported from the wharf to his lumber yard, a half mile distant; and that the libel was filed five days after the discharge was completed to establish a lien. It was held, that, as the delivery was unconditional, the lien had been lost.

Contract Right to Detain Boat to Unload Cargo—Violation by Carrier—Goods Warehoused without Notifying Consignee.—And in *Western Transp. Co. v. Barber*, 56 N. Y. 544, it appeared that plaintiff received a cargo of oats for transportation, giving a bill of lading which provided that the consignee should have three week days, after arrival and notice, to discharge cargo, and for every day's demurrage beyond the three should pay a specified percentage on freight. It was held, that the consignee had a right to detain the boat, if he deemed it necessary, a reasonable time after the three days to complete the delivery; that the right so to detain could be terminated only by notice from the carrier, to the effect that if the goods should not be received within some reasonable time therein specified they would be stored elsewhere; and that a deposit of the grain by the carrier, at the end of the three days, in defendant's warehouse, without such notice, was in violation of the rights of the owner and put an end to the carrier's lien.

c. Partial Delivery.

But the carrier may deliver part of the goods and still have a lien on the portion retained for the charges due upon the whole consignment.

United States.—*Sears v. Bags of Linseed* (C. C.), Fed. Cas. No. 12,589.

California.—*Frothingham v. Jenkins*, 1 Cal. 42, 52 Am. Dec. 286.

Georgia.—*Pennsylvania Steel Co. v. Georgia R. & B. Co.*, 94 Ga. 636, 3 Am. & Eng. R. Cas., N. S., 685, 21 S. E. 577.

Illinois.—*Hale v. Barrett*, 26 Ill. 195, 79 Am. Dec. 367; *Schumacher v. Chicago & N. W. Ry. Co.*, 108 Ill. App. 520, 69 N. E. 825, 207 Ill. 199, 10 R. R. R. 644, 33 Am. & Eng. R. Cas., N. S., 644.

Iowa.—*Chicago, etc., R. Co. v. N. W. Union Packet Co.*, 38 Iowa 377.

Kentucky.—*Boggs v. Martin*, 52 Ky. 239.

Massachusetts.—*Lane v. Old Colony, etc., R. Co.*, 80 Mass. 143; *New Haven, etc., Co. v. Campbell*, 128 Mass. 104, 35 Am. Rep. 360, *Potts v. New York & N. E. R. Co.*, 131 Mass. 455, 3 Am. & Eng. R. Cas. 424.

Mississippi.—*New Orleans & Northeastern R. Co. v. George*, 83 Miss. 710, 35 So. 193.

New York.—*McFarland v. Wheeler*, 26 Wend. (N. Y.) 467; *New York Cent. & H. R. R. Co. v. Davis* (N. Y. Sup. Ct.), 86 Hun 86, 34 N. Y. Supp. 206.

Pennsylvania.—*Fuller v. Bradley*, 25 Pa. St. 120.

Wisconsin.—*Jeffris v. Fitchburg R. Co.*, 93 Wis. 250, 67 N. W. 424; *Warehouse & Builders' Supply Co. v. Galvin*, 96 Wis. 523, 71 N. W. 804.

The carrier may release its lien upon part of the cargo, and retain the balance for the charges upon the whole cargo. So held in *Chicago, etc., R. Co. v. N. W. Union Packet Co.*, 38 Iowa 377.

Proof of Intention to Waive Lien Required—Right of Stoppage in Transitu.—In *Potts v. New York & N. E. R. Co.*, 131 Mass. 455.

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the fact that the amount claimed may be too large, unless a tender is made of the amount due. So held in *Schumacher v. Chicago & N. W. R. Co.*, 108 Ill. App. 520, 69 N. E. 825, 207 Ill. 199, 10 R. R. R. 644, 33 Am. & Eng. R. Cas., N. S., 644.

Promise to Refund Overcharge.—Where the consignee has tendered the proper freight charges, he is under no obligation to pay an overcharge upon it, upon the verbal promise of the warehouseman to refund all over a proper charge. So held in *Northern Trans. Co. v. Sellick*, 52 Ill. 249.

Offer to Give Security.—An offer to give good security for the payment of freight is not sufficient to compel delivery of the cargo by the master of a vessel. So held in *Frothingham v. Jenkins*, 1 Cal. 42, 52 Am. Dec. 286.

3. CREDIT GIVEN.

The carrier loses its lien by accepting notes, or otherwise giving credit, for the amount due and delivering the goods to the consignee. *Bird of Paradise*, 72 U. S. 545; *Sicard v. Buffalo, etc., R. Co.* (C. C.), Fed. Cas. No. 12,831; *Pinny v. Wells*, 10 Conn. 104; *Sears v. Wills*, 86 Mass. 212; *Geneva, etc., R. Co. v. Sage* (N. Y. Sup. Ct.), 35 Hun 95.

Lien Waived—Mistake as to Consignee's Solvency.—In *Sears v. Wills*, 86 Mass. 212, it is held, that if a lien for freight is waived, under the belief the consignee is solvent, and his estate subsequently proves to be insolvent, this is not such proof of mistake as to entitle the owners of the ship to relief in equity.

Agreement to Take Acceptance Instead of Cash—Subsequent Insolvency.—Insolvency of the shipper occurring while the goods are in transit, or before they are delivered, will not absolve the carrier from an agreement to take an acceptance on, instead of cash, for the freight, nor authorize him, when he had made such an agreement, to retain the goods until the freight is paid. So held in *The Bird of Paradise*, 72 U. S. 545.

Accidental Return of Goods to Carrier's Possession.—If a warehouseman or consignee delivers goods upon the receipt of the promissory note of the owner for charges, he loses his lien, which will not revive should the goods accidentally be returned to his possession. So held in *Hale v. Barrett*, 26 Ill. 195, 79 Am. Dec. 367.

Note Dishonored before Discharge of Cargo.—But, as a bill of exchange or promissory note given for a prior debt does not extinguish the debt, unless such was the agreement of the parties, a bill or note falling due before the unloading of the cargo and protested and unpaid, is no discharge of the ship's lien, and the shipowner, in such a case, may stand upon it as fully as if the acceptance had never been given. So held, in *The Bird of Paradise*, 72 U. S. 545.

Notes Payable at Time of Expected Arrival of Ship.—It is not to be presumed that the owner of a ship, having a lien upon the cargo for the payment of the freight, intended to waive his lien by taking the notes of the charterers drawn so as to be payable at the time of the expected arrival of the ship in port. In such case, the notes being unpaid, he may return them, and enforce his lien. So held in *The Kimball*, 3 Wall. (U. S.) 37.

Balance of Charter-Money Payable within Ten Days after Discharge of Cargo—Right to Retain Cargo.—In *The Kimball*, 3 Wall. (U. S.) 37, it is held, that stipulations in a charter party requiring the delivery of the cargo within reach of the ship's tackle, and providing that the balance of the charter money remaining unpaid on the termination of the homeward voyage shall be "payable, one-half in five, and one-half in ten days after discharge" of the cargo, are not inconsistent with the right of the shipowner to retain the cargo for the preservation of the lien.

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Lien Waived by Agreement.—In the *Bird of Paradise*, 72 U. S. 543, it is held, that presumption is in favor of the existence of the shipowner's lien upon the cargo for the freight, but it may be modified or displaced either by direct words or by stipulations incompatible with the existence of the lien.

Special Contract—Absence of Inconsistent Stipulations.—But that there is a special contract between a common carrier and his employer regarding the services to be performed and the compensation, does not deprive the carrier of his right of lien, unless there is something in the contract inconsistent with the existence of the lien. So held in *Pinny v. Wells*, 10 Conn. 104.

Construction of Charter Party—Owners Binding Vessel and Charterers Binding Cargo.—A clause in a charter party, by which the owner binds the vessel, and the charterers bind the cargo, for the performance of their respective covenants, is sufficient to repel doubt arising upon the construction of other stipulations not plainly controlling them, as to whether the lien for freight was intended to be waived by the parties. So held in *The Kimball*, 3 Wall. (U. S.) 37.

4 REFUSAL TO DELIVER ON OTHER GROUNDS.

The carrier impliedly waives its right to detain the goods for its charges by refusing to deliver them on grounds which are inconsistent with the existence of the lien. See *Weeks v. Goode*, 95 Eng. Com. L. Rep. 365; *Leigh Bros. v. Mobile & Ohio R. Co.*, 58 Ala. 165; *Spence v. McMillan*, 10 Ala. 583; *Louisville & N. R. Co. v. McGuire*, 75 Ala. 395; *Atterson v. Briant*, 1 Camp. (Eng.) 409; *Picquet v. M'Kay*, 2 Black. (Ind.) 465.

In *Weeks v. Goode*, 95 Eng. Com. L. Rep. 365, it is held, that a lien may be waived by the party's setting up a claim to retain the chattel upon a different ground.

In *Louisville & N. R. Co. v. McGuire*, 79 Ala. 395, it is held, that if failure to deliver the goods on demand of the consignee, is not placed on the ground of a lien for charges, the carrier cannot set up such lien in defense of a subsequent action for the loss of the goods.

Refusal to Deliver Except to Consignee or Holder of Receipt—Lien Not Asserted.—Where a common carrier, when the goods are demanded of him by the true owner, refuses to deliver them except to the consignee or the person holding the receipt for transportation, but asserts no lien for storage paid by him, he cannot afterwards set up that claim to defeat an action by the owner, but must be held to have waived it. So held in *Leigh Bros. v. Mobile & Ohio R. Co.*, 58 Ala. 165. See also, *Spence v. McMillan*, 10 Ala. 583.

Lien Not Mentioned—Evidence of Tender Not Required.—If a carrier having a lien upon goods, when they are demanded of him, claims to retain them upon a different ground, making no mention of the lien, trover may be maintained against him, without evidence of any tender having been made of the amount of his lien. So held in *Atterson v. Briant*, 1 Camp. (Eng.) 409.

Carrier Claiming Ownership.—In *Picquet v. M'Kay*, 2 Black. (Ind.) 465, it is held, that if a person has a lien on goods for the price of hauling them to a place of deposit, his subsequently claiming them as his own, and refusing, on that ground, to deliver them to the owner, is a waiver of the lien.

Declaring Goods Are Not at Place of Demand.—A carrier waives its right to detain goods for freight if its refusal to deliver is on the ground that they are not in its possession at the place where a demand is duly made. So held in *Adams Express Co. v. Harris*, 120 Ind. 73, 40 Am. & Eng. R. Cas. 151, 21 N. E. 340. See also, *Rosenfeld v. Peoria, etc., R. W. Co.*, 103 Ind. 121, 53 Am. Rep. 500, 21 Am. & Eng. R. Cas. 87; *Bartlett v. Pittsburgh, etc., R. W. Co.*,

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94 Ind. 281, 18 Am. & Eng. R. Cas. 549; *United States Express Co. v. Backman*, 28 Ohio St. 144.

Claiming Lien for Both Freight and Storage—Claim of Freight Lien Defeated.—Where defendant put his refusal to deliver property to its owner on the ground of a lien on it for freight and also for storage, he could not in a suit against him to recover possession of the property, claim judgment on the ground that he had a lien for storage, it being held, that he had no lien for freight. So held in *Sicard v. Buffalo, etc., R. Co.* (C. C.), Fed. Cas. No. 12,831.

3, ADOPTION OF OTHER REMEDY.

The carrier waives its lien by attempting to recover the freight and other charges which have accrued on the goods by means of an action against the owner or consignee, or other remedy incompatible with the enforcement of the lien.

Attachment.—Thus where a carrier sues out and procures to be levied a writ of attachment against property on which it has a lien for freight, it thereby abandons and forfeits the lien. So held in *Wingard v. Banning*, 39 Cal. 543.

Delivery of Cargo—Suit for Demurrage—Subsequent Claim of Lien.—Where no notice of any claim or lien for demurrage is made at the time of delivery of the cargo, nor before the commencement of a suit to recover demurrage, no action in rem against the cargo can be sustained. So held in *Riley v. A Cargo of Iron Pipes* (D. D.), 40 Fed. Rep. 605.

Goods Wrongfully Replevied from Carrier—Assumpsit—Other Goods Attached.—But where goods detained by the owner of a vessel for freight charges have been wrongfully taken from him by the owner by means of a writ of replevin, if the owner of the vessel brings an action of assumpsit for the freight, and attaches other goods to secure the demand, the lien upon the goods first mentioned for the freight charges is not thereby discharged. So held in *Barnard v. Wheeler*, 24 Mo. 412.

A. R. Y.

BEIER v. ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, Division No. 1, May 30, 1906.)

[94 S. W. Rep. 876.]

Street Railroads—Negligence—Question for Jury.—In an action against a street railway for injuries received by plaintiff through a collision between his wagon and defendant's car, evidence examined, and held sufficient to go to the jury on the question of defendant's negligence.

Evidence—Rate of Speed—Opinion Evidence.—In an action against a street railway for injuries resulting from a collision between plaintiff's wagon and defendant's car, expert evidence was not required to prove that the car was going fast at the time of the accident.

Street Railroads—Unlawful Speed—Ordinances.*—The speed at which a street car is running may be negligent speed, although ordinance speed or less, depending on the care required under the circumstances.

Same—Sufficiency of Evidence.—Where, in an action against a street railway for injuries received by plaintiff from having his wagon struck by another wagon with which defendant's car collided, there was evidence that the latter wagon straddled a rail of the track in

*For the authorities in this series on the subject of the care required of those in charge of street cars to regulate the speed of cars, to prevent collisions with other users of streets, see *Foult v. Wilmington City Ry. Co.* (Del Sup'r. Ct.), 19 R. R. R. 541, 42 Am. & Eng. R. Cas., N. S., 541 (in approaching a crossing where there is a steep down grade, it is the duty of a motorman to make the descent at reasonable speed, so as not to put the car beyond his control); *Smith v. Minneapolis St. Ry. Co.* (Minn.), 19 R. R. R. 536, 42 Am. & Eng. R. Cas., N. S., 536 (care required of motorman to avoid collision with vehicle at crossing, circumstances to be considered in determining); *Ablard v. Detroit United Ry.* (Mich.), 18 R. R. R. 722, 41 Am. & Eng. R. Cas., N. S., 722 (motorman, in running car about twice as fast as he should have run it, to enable himself to control car to prevent an accident, and in relying solely upon his gong to warn travelers upon track, was negligent); *Marden v. Portsmouth, etc., St. Ry.* (Me.), 17 R. R. R. 821, 40 Am. & Eng. R. Cas., N. S., 821 (when near street crossings; and speed of car a fact from which an inference of negligence may be drawn); *Riley v. Shreveport Traction Co.* (La.), 16 R. R. R. 785, 39 Am. & Eng. R. Cas., N. S., 785 (fact that car runs quite a distance after accident is not always conclusive that there was negligence on the part of the motorman); *McVean v. Detroit United Ry.* (Mich.), 15 R. R. R. 464, 38 Am. & Eng. R. Cas., N. S., 464 (duty of motorman to slow up upon seeing horse is frightened); *Butler v. Rockland, etc., St. Ry.* (Me.), 14 R. R. R. 778, 37 Am. & Eng. R. Cas., N. S., 778; *Richmond P. & P. Co. v. Allen* (Va.), 14 R. R. R. 566, 37 Am. & Eng. R. Cas., N. S., 566 (negligence in running down team from behind); *Heinze v. Metropolitan St. Ry. Co.* (Mo.), 13 R. R. R. 107, 36 Am. & Eng. R. Cas., N. S., 107 (speed of street car may be negligent though not exceeding rate fixed by ordinance); *Riska v. Union Depot R. Co.* (Mo.), 11 R. R. R. 294, 34 Am. & Eng. R. Cas., N. S., 294 (speed and absence of signals at crossings as negligence, sufficiency of instructions); *Mathiesen v. Omaha St. Ry. Co.* (Neb.), 11 R. R. R. 777, 34 Am. & Eng. R. Cas., N. S., 777 (speed of car a material question in collision cases); *Warner v. St. Louis, etc., R. Co.* (Mo.), 11 R. R. R. 809, 34 Am. & Eng. R. Cas., N. S., 809; (speed of car, no faster than usual at that

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advance of the car for 100 or 150 feet before the wagon was struck, and that the team drawing the same were walking, during which time the car must have moved several hundred feet, formal proof that the car might have been stopped in time to avoid the injury was unnecessary.

Same—Failure to Signal—Instructions.—In an action against a street railway for injuries to plaintiff in a collision between his wagon and defendant's car, the petition charged defendant with so negligently, carelessly, and unskillfully operating said car and permitting it to move rapidly that it suddenly and with great force ran into a wagon, etc., forced the same against plaintiff's wagon, etc., and further counted on the theory that it was defendant's duty to keep control of the car under the circumstances, and to signal the approach of the car by ring of bell; that defendant negligently omitted those duties; and that its motorman knew, or by the exercise of ordinary care would have known, that the car and wagon would collide at the place of the accident. Held, that defendant's negligence was not alone predicated in the petition of the rapid speed and failure of defendant to ring the bell, and an instruction taking unlawful speed and the ringing of the bell from the jury, and charging that if defendant's motorman saw, or by the exercise of reasonable care and diligence would have seen, in time to have stopped the car, that an accident was imminent, and that he failed to exercise reasonable care and diligence to stop the car, defendant was liable, was proper.

Witnesses—Prior Contradictory Statements—Admissibility.—By merely issuing a subpoena for a witness, and by not putting him on

point, though faster than customary in other parts of the city, did not constitute negligence); *Hanlon v. Milwaukee Elec. Ry. & Light Co.* (Wis.), 9 R. R. R. 288, 32 Am. & Eng. R. Cas., N. S., 388 (what rate of speed of car is negligent depends upon circumstances, in the absence of municipal regulations); *West Chicago St. R. Co. v. Petters* (Ill.), 2 R. R. R. 613, 25 Am. & Eng. R. Cas., N. S., 613 (duty to regulate speed of cars at crossings); *Bass' Adm'r v. Norfolk Ry. & Light Co.* (Va.), 1 R. R. R. 194, 24 Am. & Eng. R. Cas., N. S., 194 (negligence to operate car at unusual and excessive speed at public crossing). *Riley v. Salt Lake R. T. Co.* (Utah), 1 Am. & Eng. R. Cas., N. S., 266 (the operation of street cars at a rate of speed in violation of a statute or ordinance is conclusive evidence of negligence where no explanation is given); *Harper v. Philadelphia Traction Co.* 175 Pa. St. 129 (negligence in running car at a dangerous rate of speed was the proximate cause of the accident); *Lawfer v. Bridgeport Traction Co.* (Conn.), 7 Am. & Eng. R. Cas., N. S., 788 (certain statute did not, by establishing a maximum rate of speed for cars, intend that any less rate should not be considered reckless); *Stafford v. Chippewa Val. Elec. R. Co.* (Wis.), 23 Am. & Eng. R. Cas., N. S., 364 (the test of negligence in the rate of speed of a street car is the speed at which ordinarily prudent persons would exercise under similar circumstances).

For the authorities in this series on the subject of the care required of those in charge of street cars to prevent collision with other users of streets, see foot-notes appended to *Jacksonville Elec. Co. v. Adams* (Fla.), 20 R. R. R. 295, 43 Am. & Eng. R. Cas., N. S., 295; foot-notes appended to *Latson v. St. Louis Transit Co.* (Mo.), 19 R. R. R. 845, 42 Am. & Eng. R. Cas., N. S., 845; foot-note appended to *Boudwin v. Wilmington City Ry. Co.* (Del. Sup'r Ct.), 19 R. R. R. 564, 42 Am. & Eng. R. Cas., N. S., 564; *Foult v. Wilmington City Ry. Co.* (Del. Sup'r Ct.), 19 R. R. R. 541, 42 Am. & Eng. R. Cas., N. S., 541; *Smith v. Minneapolis St. Ry. Co.* (Minn.), 19 R. R. R. 536, 42 Am. & Eng. R. Cas., N. S., 536; *Ablard v. Detroit United Ry.* (Mich.), 18 R. R. R. 722, 41 Am. & Eng. R. Cas., N. S., 722; *McKee v. Harrisburg Traction Co.* (Pa.), 18 R. R. R. 3, 41 Am. & Eng. R. Cas., N. S., 3.

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to be driven over the embankment on the north side of Gravois Road; his wagon with his load of manure was upset, the plaintiff falling underneath same, and being seriously injured." In other paragraphs, it is charged as follows: "Plaintiff further states that it is the duty of the defendant to have its motorman, operating cars in the city of St. Louis, to carefully observe the highway upon which the car is being operated, and to keep said car under such control as will enable the motorman from colliding with persons or vehicles passing along the highway, and to warn persons upon the highway, who are in danger of being run over or into, of the approach of the car, in time to prevent a collision. Plaintiff further states that when said car started from or near the top of the hill on Gravois Road, on, to wit, December 21st, between the hours of 11 a. m. and noon, to go in a westerly direction, there were a number of teams being driven in the same direction along the north side of said road immediately adjoining the tracks upon which said car was running, and the motorman knew, or by the exercise of ordinary skill and care would have known, that said wagons or the loads thereon were liable to come in contact with a car attempting to pass said wagons, and particularly as they approached and were upon said bridge, and it was the duty of the motorman in charge of said car to go slowly down said decline, keep his car under full control so as to enable him to stop within a few feet should necessity require, and to notify each person of the car's approach by ring of bell, in time to prevent such person driving upon or near the car track, and enable persons to escape from danger. Plaintiff further states that the motorman in charge of the car aforesaid neglected his duties, and negligently and carelessly and unskillfully permitted said car to move rapidly, failed to keep such car under such control as would enable him to bring said car to a sudden stop within a short space, and failed to so ring his bell as to notify one Ebert, who was sitting upon a load of manure and driving upon the northern side of said Gravois Road in a westerly direction, of the car's approach in time to enable said Ebert to escape from danger and avoid a collision, and said motorman in charge of said car unskillfully, carelessly, and negligently ran said car, or permitted said car to be run, violently and with great force against the wagon and team in charge of said Ebert, and forced said wagon and team to move suddenly and rapidly along said road immediately in front of said car, and against the wagon and team in charge of plaintiff, which was immediately before said Ebert, with such violence that the plaintiff's team and wagon were forced over the embankment, the wagon upset with the plaintiff thereon, the wagon and harness broken, and the plaintiff severely and permanently injured." The answer was a general denial.

There was a sharp conflict on facts relating to the happening itself, but none on the environment—the physical characteristics of the locus—and, as said, the extent of the injuries to plaintiff

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stands confessed; the evidence tending to show he was crushed and permanently crippled. A description of the place and an understanding of the general facts are essential on the question of the degree of care due to travelers on that highway at that spot and that time, and, attending thereto, it is agreed on all sides to be as follows: Gravois Road is a macadamized thoroughfare in St. Louis, running east and west, on which are laid two tracks of defendant, the north track for west-bound cars, the south track for east-bound cars. On a hill on Gravois Road, and we infer at the junction of Grand avenue and Gravois Road, is a tavern called (properly, maybe, but this question is not here) the "House of the Good Shepherd." From this tavern west to the next street, Chippewa, or at least to a bridge, there is a sharp downgrade in the road and defendant's tracks for a distance of, say, 600 feet, and from the tavern to beyond the bridge, to wit, to Chippewa street, any object on the track could be seen by a motorman, though between those points somewhere there was a curve. At the lower terminus of this downgrade there is a small bridge spanning a creek, and this bridge has railings or balustrades to the right and left, and on either side of the tracks of defendant there is barely room for wagons and cars to pass each other on this bridge, and the evidence indicates that wagons, known as "manure wagons," could not safely so pass; a manure wagon being the ordinary road wagon with an ordinary bed, superimposed on said bed being sideboards projecting out some distance from the top of the bed and requiring more room than an ordinary road wagon. The Gravois Road is built up from 5 to 12 feet higher than the surface of the ground on either side, and we infer that at the place of the accident the embankment was about 12 feet high. Along this road on either side of defendant's tracks, before reaching the bridge, there is room for wagons to pass cars, but the embankment to the right and left of the tracks was uneven in places, sometimes sloping outwardly from the tracks and sometimes inwardly to the tracks, and as it approached this bridge the embankment narrowed itself a few feet to the dimensions of the bridge. Snow and sleet had fallen a few days before, and the rails of defendant's tracks are described as "sweaty," or somewhat slick. The snow had been pushed from the tracks to either side and left on that part of the road traveled by vehicles, and such part of the roadway is, also, described as "slick." At about 12 m. on said date, a cold winter day, six loaded manure wagons were being driven slowly west on Gravois Road from the House of the Good Shepherd down said hill towards said bridge. These wagons, commencing with the hindmost and following in their order, were driven by Basel, Hummert, Stolle, Heuseler, Ebert, and Beier; the latter, the plaintiff. At first they were all on the north or right-hand side of defendant's north track; but somewhere between the tavern and the bridge, and while the car doing the damage was between the same points, Stolle crossed from right to

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left, and thereafter the procession moved on west in a walk with five wagons on the right and one on the left of defendant's north track. Some of the wagons, including plaintiff's, which was in the lead, were outside the track, but the wagon next to plaintiff's (Ebert's) "spread" the north rail, i. e., his left-hand wheels were on one side of the rail and his right-hand wheels on the other, and Ebert had been proceeding in this way for, say, 100 to 150 feet, according to plaintiff's evidence; but according to defendant's evidence it was not so, as will presently appear.

It seems this procession of wagons had been on Grand avenue and turned into Gravois at the tavern, and, while on Grand avenue and about at the tavern, some of them had been on defendant's track, and the motorman of the car in question, "Cherokee No. 74," had a verbal squabble with one of them for being on the track and called him a "d—d Hoozier," whatever that may mean—thus showing aggravation over the use of the tracks by wagoners. There was evidence from passengers that the car ran downgrade unchecked until the instant of the collision. The gloom, nisi, was brightened a bit by a gentle glow of humor at one place. Thus: A lady passenger, through some power of feminine intuition, i. e., ability to see the shadows which coming events cast, testified she read the impending collision in her own feelings, and in the manner and voice of the motorman. ('Twas thus Goldsmith's sapient schoolboys, intently and cunningly eyeing the master, "Learned to trace the day's disasters in his morning face.") The good lady spoke in chief as follows: "Q. What was the first thing you noticed of this collision? A. When I got on the car (at the House of the Good Shepherd) I was so nervous I thought there was going to be an accident. Q. Why did you think so? A. Because the motorman seemed so mean and saucy before he started the car." On cross-examination she stood by her guns, thus: "Q. You knew there was going to be an accident happen there anyhow? A. Yes, I did. Q. How did you know that? A. Because I felt like that, and I was so nervous, and the motorman was so mean." The evidential value of her after-the-fact and Cassandra-like prophesying was weakened a morsel by a too wide play in generalization, as witness the next question and answer: "Q. They are all mean, are they not? A. Yes, sir; indeed they are—most of them, anyhow." There is other evidence that the car, Cherokee No. 74, stopped at the tavern and there took on more passengers, and, while so doing, the procession of manure wagons turned into Gravois Road, got ahead of the car (also turning the corner there) and passed on down towards the bridge, as said. Plaintiff's evidence also tended to show that as the car left the tavern and went downgrade the brakes were not controlling its movement. Some of the evidence indicated that, when Stolle passed from one side of the north track to the other, the bell or gong was rung. Other evidence indicated that from that time on for 200 feet or so no bell was rung. On the question of its rate of

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speed generally, while covering the ground from the tavern to the point of collision, the evidence may be summarized as follows: One witness testified it ran at the rate of 15 or 20 miles an hour, another that it ran "pretty fast," another that it ran "pretty lively," another, a passenger, that it ran "pretty rapidly," another passenger that it ran "very rapidly," and one of defendant's witnesses testified that it went at a "pretty lively rate." The evidence further tended to show that these wagons were somewhat strung out, were all in plain view of the motorman after his car left the House of the Good Shepherd, and that the rear wagon was over 200 feet behind plaintiff's, and Ebert's about 15 feet behind plaintiff's. Plaintiff's evidence, furthermore, tended to show that, when the car passed Basil, Hummert, Stolle, and Heuseler, it struck Ebert's wagon and knocked it ahead, caught up with it, rammed it again, fastened itself to it, then jammed it against plaintiff's wagon, which, as said, was outside of the track, tumbled it over the embankment, smashing and entirely destroying it and the harness, and overturning the wagon into what some of the witnesses call a "ditch," some a "hole," and some the "creek," with plaintiff pinned underneath; part of the wagon resting on his chest. Ebert's horses ran for a block or so, and Ebert did not return. The conductor and others went down and took plaintiff out of the ditch from under the debris of the wagon. However, the motorman went not down, withal, but seems to have had his attention momentarily diverted. Witness the following testimony from the conductor, introduced (as part of the *res gestæ*, possibly) without objection, thus: "Q. Did you go down before? Or who went down first? A. I went first and called for help. Q. Did the motorman follow you? A. No, sir; he couldn't. Q. Why? A. Because there were so many after him * * * They were after him, but how he was got off the car I could not say. Q. Didn't you see him there where the wagon was after the accident? A. He was on the ground there by the wagon. He was all around, everywhere. He was just all around there. Q. Did you see him running and see the people after him? A. Yes, sir." The wagon was pitched over at the west end of the bridge, and there is evidence indicating that Ebert's was struck while on the bridge. Ebert heard no bell and did not know the car was in his vicinity until his wagon was struck. Plaintiff heard a bell just at the instant his (Ebert's) wagon was struck, gave a glance back, saw the car at hand, and his wagon was struck at once by Ebert's. The theory of defendant, and which its testimony tended to establish, was that all of these wagons were clear of the track after Stolle crossed; that the power was off the car as it went down the grade; that the brake was on somewhat and the motorman in position and attentive; that, while thus proceeding, Ebert turned his horses quickly and drove on the track immediately in front of the car when it was too late to stop; that the motorman gave a sharp alarm with his gong, put on brakes, and

reversed his power; but that the accident was unavoidable, the car then being but its length away, and struck Ebert's wagon a diagonal blow forcing it against Beier's and knocking Beier's off the embankment, and thus, as said, injuring plaintiff and destroying his wagon and harness. Having testified that the car ran its own length after Ebert pulled to the left on the track, the conductor further testified: "Q. * * * About how short did that car stop from the place where it struck the wagon to where it stopped? A. About eight or ten feet. O. Then of course, it could be stopped within eight or ten feet on that track on that day? A. It was done; yes, sir." There was some evidence on behalf of plaintiff to the effect that, while Ebert's wagon spread the north rail, yet when on the bridge, and we think after the first blow by the car, being unable to pull sharply to the right because his wheels were too close to the north rail and because of the balustrade of the bridge, he undertook to save the situation by pulling to the left to get on the south track, but the details of this testimony seem not material to the issues here.

Under these pleadings and this testimony, the court refused a mandatory instruction for defendant and gave instructions No. 1 and No. 2 for plaintiff; defendant excepting. Instruction No. 2 relates to the measure of damages and needs no attention. Instruction No. 1, given for plaintiff, is as follows: "If the jury find and believe from the evidence that one William Ebert was driving a two-horse team drawing a wagon load of manure on the north side of Gravois avenue, partly in the west-bound track of the defendant railway, and that a car of defendant in charge of its servants, or employees, ran into said wagon and forced the said wagon against a wagon being driven along said Gravois avenue in a westerly direction by the plaintiff, Earnest Beier, and caused the wagon with said Ernest Beier to be thrown down an embankment and injured, then the jury will find a verdict for the plaintiff Ernest Beier; provided, the jury further find and believe from the evidence that the motorman in charge of said car saw, or by the exercise of reasonable care and diligence would have seen, the said William Ebert in a position of danger from the approach of said car, in time to have stopped said car, by the exercise of reasonable care and diligence, with the means at his command, before colliding, and further find that said motorman failed to exercise reasonable care and diligence to bring said car to a stop, after he discovered, or by the exercise of ordinary care and diligence would have seen, said Ebert on the track in time to have averted the collision."

The court gave all instructions (except the demurrer) prayed for defendant, as follows: "(1) The court instructs the jury that there is no evidence in this case to support the plaintiff's charge that the car was being operated at an unlawful speed, or that the motorman failed to sound his gong. Under the law a motorman in charge of an electric car has the right to presume that a traveler driving along parallel to the track, and in a position of safety

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from a passing car, will not drive on or dangerously near the track, and that a traveler driving on the track will drive off the track to allow a car to pass. The motorman has the right to act on this presumption until the traveler does some act that would indicate to a reasonably careful person that the traveler was unaware of the approach of the car. And after the motorman has discovered, or by the exercise of ordinary care might have discovered, that a traveler is driving on or dangerously near, or will not drive off the track, he (motorman) is then bound only to use ordinary care in stopping his car to avert a collision. (2) The court instructs the jury that before, under any circumstances, the plaintiff can recover in this case, the law compels him to prove by a preponderance of evidence that the motorman in charge of the car was negligent in failing to stop said car after the dangerous situation of the said Ebert's wagon was, or by the exercise of ordinary care could have been, discovered in time to avoid a collision. The mere fact that there was a collision is no evidence in this case that defendant's motorman was guilty of any act of negligence charged in the plaintiff's petition. (3) The jury are further instructed that if they believe from the evidence that plaintiff's team was in front of the one driven by Ebert, and that Ebert undertook to pass the plaintiff's team by pulling, or driving around him, and in so doing came suddenly upon the track in front of the moving car, and so near that the motorman in charge of said car had not the means, time, or ability to stop his car and avoid striking Ebert's wagon, then the defendant was not guilty of such negligence as will authorize the plaintiff to recover in this action; and your verdict must be for defendant. (4) The court instructs the jury that if you find and believe from the evidence in this case that Ebert was driving west on defendant's track, along Gravois Road, and, as the defendant's car approached the said Ebert's wagon, the said Ebert attempted to drive his team out of the defendant's track so as to permit the said car to pass, and that there was no reasonable and apparent cause why the said Ebert should not have gotten his team off the track in his attempt to do so, then the motorman had a right to presume that the said Ebert would clear the track for the car to pass, and, if you find that the motorman used ordinary care in watching the said Ebert and in stopping his car after the motorman had discovered that said Ebert was not going to clear the track, then your verdict must be for the defendant."

The record facts pertaining to the exclusion and admission of testimony will be supplied when that assignment of error is under consideration. On this record, was the verdict the product of a fair trial? Appellant insists it was not, for that appellant's mandatory instruction should have been given, for that the instructions for plaintiff should not have been given, for that the defendant should have been permitted to read in evidence the prior statements of two of defendant's witnesses, Stolle and Meuser, and further erred in permitting plaintiff's witness Tie-

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mann to relate part of a conversation between him and defendant's motorman after the collision.

1. The first insistence of defendant is, in effect, that there was no case to go to the jury. But self-evidently there can be little merit in this contention under the facts of this record. And this is so, because the car was running downgrade for 600 feet in a public street, in full day, and with no obstruction to the motorman's vision. In front of the motorman was a slow procession of loaded and wide manure wagons rightfully on a high embankment and on either side of its track, with the head of that procession approaching a bridge where the embankment narrowed and upon which bridge it was barely possible, if at all, for one of such wagons to pass a car on the right-hand side. Not only so, but, as the procession was scattered along back for, say, 200 feet, the wagons north of the north track had no room to spare. Not only so, but we must assume, under a demurrer to the evidence, that the jury believed plaintiff's evidence showing that the track was not clear and that the second wagon from the front was straddling the north rail for 100 to 150 feet. The situation, then, was highly ticklish and delicate, and ordinary care under such circumstances required this car should move into that procession under full control, and that the motorman should approach that bridge realizing he might instantly have to stop his car because of danger to persons and property in front. It was his bounden duty, therefore, to keep a vigilant watch and to put his car under control, and there is ample evidence tending to show he negligently ignored the situation and did neither. That this case was entitled to go to the jury under the circumstances here presented is not an open question in this state. *Schafstette v. Railroad*, 175 Mo. 142, 74 S. W. 826, and cases cited therein, as well as in respondent's brief.

2. But it is claimed by defendant there was (1) no evidence as to the rate of speed, and (2) no testimony tending to show the car could have been stopped after the danger of a collision became apparent. Neither of these contentions, in our opinion, is sound under this proof, because: (a) True it is that only one witness, and he illy qualified to speak, placed an estimate on the car's speed in miles per hour. But it requires no expert to tell when a car is going fast, and the record abounds with evidence tending to show this car was going fast. Speed may be negligent under critical circumstances, as in this case, and at the same time be ordinance speed, or less. In other words, unlawful speed may be one thing and negligent speed may be another. For instance, a car under a general ordinance might be allowed to move at 10 or 15 miles an hour through a city, and yet ordinary care, i. e., the care that an ordinarily prudent person would or should exercise under similar circumstances, is a comparative thing. What would be ordinary care under one condition might be stark negligence under another. The care necessary in the affairs of men shifts with, and automatically adjusts itself to,

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the circumstances of the case, and could it be said that a prudent person would allow a car to plunge through a procession of heavily loaded wagons on a high and narrow embankment and over a bridge such as this, with a wagon ahead of it straddling the track, at a rate of speed indicated by this proof, ordinance or no ordinance? We think not. The law is not so written, and no soundly reasoned out case can be found in the books sustaining that view. The petition does not proceed on the theory of a violation of ordinance speed, or that the speed was unlawful in the sense that it was in excess of ordinance provision. The pleader sets forth the whole situation at the time and avers that the car was, under those circumstances, proceeding negligently in speed, in the lack of warning and in not being under control, i. e., it states a case of negligence at common law. *Heinzle v. Railroad*, 182 Mo., loc. cit. 555, 81 S. W. 848; *Klockenbrink v. Railroad*, 172 Mo., loc. cit. 689, 690, 72 S. W. 900. (b) Considering the contention of defendant to the effect that there was no testimony tending to show that the car could have been stopped after the danger of a collision became apparent, it is, in substance, as we understand it, a contention that plaintiff should have proved in what distance a car going at the rate of this one could have been stopped on that grade and condition of track, and, failing so to prove, the case falls to the ground. But, in a forum of reason, why incur a case with the opinion testimony of experts as to the distance in which a given car going at a given rate down a given grade on a given condition of track can be stopped, where there is evidence in the case that the car was actually stopped in its own length plus eight or ten feet, for such was the substance of the conductor's testimony? If it be true that Ebert's wagon straddled the north rail for 100 or 150 feet before it was struck, and that his team were going in a walk, then it requires no expert to tell a jury or a court that, while he covered the 100 feet, this car could have been placed under control and all danger of a collision averted, under the facts of this case. And this is so, because the car during that time must have moved several hundred feet, and the position of Ebert's wagon was notice to the motorman that a collision was inevitable unless Ebert got out of the way; even courts and juries being presumed to know that two solid bodies cannot (without trouble) occupy the same space at the same time (if at all) and may use their common sense in determining without formal proof, under circumstances like these, that a car may be stopped in time to avert injury. *Latson v. Railroad* (Mo. Sup.; not yet officially reported) 91 S. W. 109.

3. The court instructed the jury, for defendant, there was no evidence the car was being operated at an "unlawful speed" and no evidence the motorman failed to sound the gong. If by "unlawful" speed was meant "negligent" speed, and if by "gong" was meant "bell," and if the verdict had been the other way, there would be a serious question in the case whether, on the

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insistence of plaintiff, that instruction would not be error. As it is, however, defendant cannot (and does not) complain that the court erred in its own behalf. In this connection it is contended by defendant that instruction No. 1 for plaintiff, which ignores the rate of speed and ignores the sounding of the gong and puts the case to the jury on broad lines, was error. It was error, defendant's learned attorneys say, because defendant's negligence is alone predicated in the petition of the rapid speed and the failure to ring bell or gong. In other words, the court took unlawful speed away from the jury and took from the jury the ringing of the bell. Hence, there was nothing left to predicate negligence on. But we do not read plaintiff's petition that way. The first paragraph charges defendant with so "negligently, carelessly, and unskillfully operating said car that it suddenly and with great force ran into a wagon," etc., then being driven in a westerly direction, etc., and forcing said wagon against plaintiff's wagon and upsetting the latter over an embankment on the north side of Gravois Road and caused plaintiff to fall thereunder and be seriously injured. The petition further counts on the theory that it was defendant's duty to keep said car under control, under surrounding conditions and circumstances, and that defendant negligently omitted that duty, and it avers that defendant's motorman knew, or by the exercise of ordinary care would have known, that the car and the wagons would come in contact at or near the bridge. If, now, we apply the law as declared in instruction No. 1 to the facts of this case, and to the pleadings, as thus interpreted, the harmony of the instruction with the pleadings and with the facts in judgment and with the general principles of law is apparent, and therefore we disallow the assignment of error predicated on the giving of instruction No. 1 for plaintiff.

4. The witness Stolle, subpoenaed by both parties, was placed on the stand by defendant. This witness was one of the wagoners referred to in the foregoing part of this opinion, and had made a statement to defendant's claim agent shortly after the accident, which was reduced to writing and signed by him. In his examination in chief, as well as cross-examination, his testimony ran counter to his said ex parte statement on material matters and unfavorably to defendant. Defendant also placed upon the stand one Meuser, a carpenter. The record does not show he was subpoenaed by more than one party, the defendant. Be that as it may, he also, presently after the affair, had made and signed a statement, and, when placed on the stand by defendant, could not remember the transaction as it was put by him in his signed statement to defendant's claim agent; the trouble in his evidence being not so much a variance to his prior statement, as "flunks" of memory—non mi ricordo—the same frailty Lord Brougham met up with in the witnesses in Queen Caroline's Case. See Trial of Her Majesty, Caroline Amelia Elizabeth, Queen of England, before the Peers of Great Britain, Arranged

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for Dolby's Parliamentary Register, 1820. Having been allowed by the trial judge to cross-examine and sift these witnesses closely on these contradictions and lapse of memory—going so far as to allow defendant's attorney to show each witness his signed statement and to allow him to identify the signature and to read the statement itself, and going so far as to compel the witness to listen to questions and answers therein and to say categorically whether he had not stated thus and so—defendant, claiming surprise, then offered these signed statements in evidence, and they were excluded; defendant excepting and now assigning error in this behalf, under the authority of *Clancy v. Railroad* (Mo. Sup.; not yet officially reported) 91 S. W. 509. A consideration of this assignment of error trenches upon one of the closest and most vexed topics of the law. To disallow such evidence has been said by some courts to permit a party to be caught in a trap, i. e., sacrificed to a designing witness after having been toled by prior statements and admissions into putting him on the stand. On the other hand, the allowance of this character of evidence has been said to "enable the party to get the naked declarations of a witness before the jury, operating, in fact, as independent evidence; and this, too, even when the declarations were made out of court, by collusion, for the purpose of being thus introduced." 1 Greenleaf on Ev. (16th Ed.) § 444 *et seq.* All the well-considered cases allow a surprised party to cross-examine such recusant witness so that his memory may be refreshed, and, peradventure, his sleeping conscience pricked into wakefulness and the truth brought out. 30 Am. & Eng. Ency. of Law (2d Ed.) p. 1130; *Creighton v. Modern Woodmen*, 90 Mo. App., loc. cit. 383 *et seq.*, and cases cited. The law has nowhere shown greater wisdom than in refusing to lay down a hard and fast rule to be followed whether or no by courts, nisi, in the admission of this class of evidence. In other words, in leaving largely to the trial judge the exercise of a wise discretion to be applied to suit the varying conditions presented to him suddenly as they arise; that discretion being subject to judicial review. Based on the citation and discussion of the Missouri authorities, the learned judge, speaking for this court in the *Clancy Case*, said: "The question for decision, therefore, is whether this case falls within the general rule that a party calling a witness cannot contradict or impeach him, by showing that he has made other statements contradictory of his evidence, or whether it falls within what may be the exception to the rule, to wit, that the witness, or the adverse party to the cause, has entrapped or misled the party calling the witness by some artifice, so as to induce him to call the witness, and thereby to gain an advantage in the case over the party calling him which the adverse party would not have had if he had called the witness." It will be seen that in this, our latest pronouncement, the general rule, universally recognized by the profession and the courts, to wit, that a party may not impeach the credibility of his

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witness by evidence of general bad reputation, is left untouched. It will be seen, furthermore, that the general rule that a party calling a witness cannot contradict or impeach him by showing he has made contrary statements is still left intact as a general rule of law, subject, as all general rules are, to exceptions. It will be seen, furthermore, that, before a party calling a witness is entitled to impeach him by putting in evidence his contradictory statements, he must have been entrapped or misled by trick or artifice by the other party, or by the witness, into calling such witness and making him his own. The whole discussion in the Clancy Case proceeds on this theory, and the facts in the case at bar in no wise bring it within the reasoning and doctrine of the Clancy Case. Here the plaintiff did nothing to entrap or trick the defendant. The only thing plaintiff did was to subpoena Stolle and then refuse to call him, and it would be a novel doctrine to announce from the bench that a party misled or tricked his antagonist by merely issuing a subpoena for a witness and by not putting him on the stand. How do we know but that plaintiff was led into refusing to call this witness by the very fact that defendant had also subpoenaed him, and, in this view, the contention of defendant becomes a two-edged sword and cuts both ways. The close cross-examination allowed of both witnesses discloses no trick or artifice on the part of either of them, such as disclosed in the Clancy Case. Neither did defendant make any affidavit of surprise. Neither did defendant show that, during the long lapse of time between these statements and the trial (over two years), it had made any effort to see whether these ex parte statements were remembered or would be sustained by the witnesses under oath; nor was there any suggestion made to the court below of, nor attempt made there to show, collusion between the plaintiff and said witnesses, or either of them, to tole defendant into a snare. The nearest approach to such suggestion is made, arguendo, by defendant's learned counsel by a reference to Stolle as "one of the clan." By this, we assume, he is charged with being a gardener along with plaintiff and the other wagoners who testified on his behalf. But it can hardly be expected this court would place a judicial mark or ban on gardeners, eo nomine; gardening being the original and ideal occupation of mankind, and both court and counsel being related (distantly, to be sure) to the original gardener himself, one Adam—relationship fancifully recognized in one notable instance by a modern party weeping at his grave. See 1 Twain, "Innocents Abroad." See, also, 1 Tennyson, "Lady Clara Vere de Vere," stanza 7, when time permits. The exclusion of this offered evidence, in our opinion, was right, and within the controlling authorities. *Creighton v. Modern Woodmen*, *supra*; *Dunn v. Dunnaker*, 87 Mo. 597; *State v. Burks*, 132 Mo. 363, 34 S. W. 48; *Imhoff & Co. v. McArthur*, 146 Mo. 371, 48 S. W. 456; *Fearey v. O'Neill*, 149 Mo. 467, 50 S. W. 918, 73 Am. St. Rep. 440.

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It will not be necessary to extend this opinion by setting down the record details upon which defendant bases its insistence that error was committed in permitting plaintiff's witness, Tiemann, to relate a part of a conversation, between him and defendant's motorman after the collision. The motorman was not present at the trial, but a statement was read as and for his testimony. The record is not satisfactory as to whether this was done under the statute permitting facts set forth in an affidavit for continuance to be read in certain contingencies. Rev. St. 1899, § 687. If the statement of the motorman was read from an application for a continuance, then there can be no doubt of the correctness of the ruling, nisi, because under such circumstances "the opposite party may disprove the facts disclosed, or prove any contradictory statements made by such absent witness in relation to the matter in issue and on trial." See last clause of said section. There are some remarks in the record showing that the ruling of the trial court was based on said provision of the statute. But, whether this be so or not, it is not clear to us that the remarks, being made in the presence of the witnesses to the transaction, the bystanders, and on the very scene and heels of the accident, may not have been admissible as *res gestæ*. But, whether so admissible or not, the court refused to allow this witness to go into the details of such conversation, and the evidence trickling to the jury was not of significance enough to warrant us in reversing and remanding this case, because, if the ruling of the trial court be error, it was not error materially affecting the merits.

In our opinion, the judgment should be affirmed, and it is so ordered.

BRACE, P. J., and VALLIANT, J., concur. GRAVES, J., not sitting.

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(Supreme Court of Missouri, June 1, 1906.)

[94 S. W. Rep. 976.]

Appeal—Review—Failure to Present Question on Trial—Admission of Evidence.—The admission of evidence will not be reviewed on appeal, where no exception was saved thereto.

Railroads—Injuries to Persons on Track—Contributory Negligence.—One standing on a railroad track and absorbed in watching the passing of a train on another track was negligent.

Same—Action—Question for Jury.—In an action for the death of one run over by a railroad train while walking on the track, held a question for the jury whether the operatives of the locomotive had reason to expect the presence of persons on the track at that point.

Same—Evidence—Admissibility.—On an issue as to whether the operatives of railroad trains are charged with notice that persons may be upon the track at a certain place, such notice may be proved by the existence of paths, by gaps, stiles, and gates appurtenant to the path, by the long-continued going to and fro of people, more or less constantly, and the use of the tracks by pedestrians.

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Same—Customary Use of Track.*—The operatives of a railroad train are bound to use ordinary care to prevent injuring a person on the track at a place where they had reason to anticipate the presence of people on the track.

Same—Evidence—Sufficiency.—In an action against a railroad for the death of one run over while walking on the track, it appeared that the place of the accident was within the limits of a city, that no bell was rung as required by ordinance, that at the time of the accident decedent was standing with his back turned to the approaching train watching a train passing on a parallel track, and that he could have been seen for 300 yards by the train operatives. Held, that the operatives of the train failed to exercise ordinary care.

Trial—Instructions.—The court having instructed that if defendant's servants either failed to observe decedent upon the track, or failed to give the proper signals, or take such other action as a prudent man would have done to avoid the injury, the verdict should be for plaintiff, held, that the instruction was not subject to the criticism that it ignored the existence of concurrent negligence on the part of decedent.

Same—Argument of Counsel—Correction of Error.†—Where counsel for plaintiff, in arguing to the jury, stated that it was the duty of the court to give a demurrer to the evidence, if plaintiff had no case, and that in not doing so he had decided that the plaintiff had a case, the remark should have been withdrawn, and the trial court should have promptly corrected the error by a ruling and a cautionary reproof.

Appeal—Failure to Present Question—Motion for New Trial—Argument of Counsel.—Where no exception was saved to erroneous argument to the jury, and it was not made a ground of a motion for a new trial, it could not be complained of on appeal.

In Banc. Appeal from Circuit Court, Cooper County; Jas. E. Hazell, Judge.

Action by Fannie Eppstein against the Missouri Pacific Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Martin L. Clardy and John Cashman, for appellant.

W. G. & G. T. Pendleton and W. M. Williams, for respondent.

LAMM, J. This is a suit by the widow of Veit Eppstein to re-

*For the authorities in this series on the subject of the care required of trainmen to avoid collisions with licensees or trespassers on railroad tracks, see foot-notes appended to *Texas & N. O. Ry. Co. v. McDonald* (Tex.), 19 R. R. R. 503, 42 Am. & Eng. R. Cas., N. S., 503; *Hulsey's Adm'r v. Louisville, etc., Ry. Co.* (Ky.), 19 R. R. R. 557, 42 Am. & Eng. R. Cas., N. S., 557; *Hall v. Western & A. R. Co.* (Ga.), 19 R. R. R. 567, 42 Am. & Eng. R. Cas., N. S., 567; foot-notes appended to *Glenn's Adm'r v. Louisville & N. R. Co.* (Ky.), 19 R. R. R. 143, 42 Am. & Eng. R. Cas., N. S., 143; *Louisville, etc., Ry. Co. v. Jolly's Adm'r* (Ky.), 19 R. R. R. 154, 42 Am. & Eng. R. Cas., N. S., 154; foot-notes appended to *Alabama G. S. R. Co. v. Guest* (Ala.), 18 R. R. R. 759, 41 Am. & Eng. R. Cas., N. S., 759; *Louisville & N. R. Co. v. Redmon's Adm'r* (Ky.), 18 R. R. R. 737, 41 Am. & Eng. R. Cas., N. S., 737; *Williamson v. Southern Ry. Co.* (Va.), 18 R. R. R. 492, 41 Am. & Eng. R. Cas., N. S., 492.

†For the authorities in this series on the subject of arguments and remarks of counsel, reflecting on the credibility of witnesses, etc., see foot-notes appended to *Illinois Cent. R. Co. v. Proctor* (Ky.), 18 R. R. R. 531, 41 Am. & Eng. R. Cas., N. S., 531.

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cover statutory damages for the death of her said husband through the alleged negligence of defendant railway company. To reverse a judgment in her favor, defendant appeals.

The petition counts on the following grounds of recovery: First. That Mr. Eppstein was killed on defendant's track in the city of Boonville, where at the time there was an ordinance in force providing that no engine or car should be run at a greater rate of speed than five miles per hour, and that the bell of each locomotive should be rung continuously while such engine is passing through the city; one of the complaints being that defendant negligently violated this ordinance and by such violation caused his death. Second (to borrow the language of the petition). "Plaintiff * * * states: That on the 7th day of March, 1902, the plaintiff's said husband, Veit Eppstein, was walking southward on the track of said defendant's railway about one-half mile south of the defendant's station in said city of Boonville, and within the limits of said city, and where the track was level and straight for a long distance, and which for many years pedestrians had been accustomed to use as a road and footpath by the forbearance and tacit consent of the defendant. That at the time and place aforesaid, and while deceased was so walking on defendant's said railway track, he was run against and struck by a locomotive attached to a train of cars, belonging to the defendant, and which approached him from the rear, whilst the same was being run, conducted, and managed by the agents and servants of the defendant, and by reason of being so struck and run against was bruised and wounded and from the effects thereof died. That the injury resulted (sic) in the death of plaintiff's said husband as aforesaid, was occasioned by the negligence and unskillfulness of the defendant's said servants and agents in operating said locomotive and train of cars in this, to wit: That said servants and agents saw, or by the exercise of reasonable diligence could have seen, in time to avert said injury, the dangerous position in which plaintiff's deceased husband was situated, and seeing, or being by the exercise of reasonable care and diligence enabled to see, the imminent peril in which her said husband was placed, and that the deceased was unaware of the near and dangerous approach of said locomotive and train of cars, negligently failed to sound the usual and ordinary signal in time to avert the said injury, and did not, at any time before the injury to her said husband, either ring the bell, sound the whistle, or give any other signal by which her said husband might be warned of the near and dangerous approach of said locomotive and train of cars, and negligently and carelessly failed to use the air brakes or other appliances provided for stopping said train, and negligently failed to use the appliances provided and at hand for putting said train under control and stopping same before it struck her said husband, but, on the contrary thereof, recklessly, negligently, willfully, and wantonly ran its said locomotive and

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train against the plaintiff's said husband, as aforesaid." The answer pleads the general issue, contributory negligence, and that Eppstein was a trespasser. The reply put in issue the new matter in defendant's answer.

At a jury trial defendant, introducing no evidence, stood on plaintiff's case. Its demurrer to plaintiff's evidence being overruled, it saved an exception. Objections were made and exceptions saved to the giving of certain instructions for plaintiff and to the refusal of certain instructions asked by defendant. Contentions are pressed here by appellant relating to the giving and refusal of instructions and relating to certain remarks made *arguendo* by counsel for respondent to the jury. But no error relating to the admission of evidence is assigned in appellant's brief. One such suggestion is made in appellant's statement, whereby the deposition of one Isenberg is challenged. Of this suggestion it may be said that it is true the introduction of this testimony was objected to, but no exception was saved to the ruling of the court nisi, and hence the matter is apparently abandoned as a ground of reversal.

Appellant's main insistence is that there was reversible error in refusing to give its instruction in the nature of a demurrer to the evidence, and this insistence seeks the facts. Attending, then, to the facts, the case made is this: Mr. Eppstein was upwards of 74 years of age. His eyesight was good, such, for example, as might be inferred from the fact that, while he wore glasses to read, he could see the time shown by his watch without putting them on. He was as active as an average man of 50. In full daylight, between 8 and 10 o'clock of the morning of March 7, 1902, a day described by one witness as a cold, winter day, Mr. Eppstein was walking south within the city limits of Boonville, and midway between the rails of a straight portion of appellant's track leading from Boonville to Tipton. There is an up-grade there to the south. He had about his neck and shoulders a shawl he was accustomed to wear, though there is no evidence it muffled his ears or in anywise interfered with his hearing, and the quality of his hearing was such that his family had no need to repeat questions or observations in order to elicit his attention or make him understand. In short, his hearing may be conceded as prime for one of his years. At that precise time there was approaching him in the rear, running south at from 8 to 10 miles an hour, a light passenger train of appellant, consisting of two coaches, a baggage car, tender, and locomotive. Whether this train was running on a regular scheduled time, or whether off time, does not appear. Neither does it appear whether Mr. Eppstein knew of the scheduled time, if any. In this condition of things and under these circumstances, without ringing its bell or giving any other warning, the locomotive ran him down and inflicted mortal wounds upon his skull, legs, and body, so crushing him as to render him unconscious, from the resulting shock of which wounds and conse-

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quent waste of blood he presently died without regaining his senses. That he was seen by appellant's train crew is inferable from the fact that the train stopped quickly—so quickly that the rear coach did not pass his body, and thereupon they took him on board and backed half a mile or so to appellant's station. But there is no evidence they saw him before they ran him down, other than might be inferred from the fact that he was in their plain eyesight for say 300 yards before the engine struck him, provided, of course, such servants were in position and on the lookout. Uncovering, at this point, further details in the environment and accident, it appears that parallel with appellant's track and about 10 feet away, for a mile or more at the locus in quo, is the main track of the Missouri, Kansas & Texas Railroad, somewhat elevated and built up by a fill and rock ballast, higher than appellant's track. At that immediate time, on said Missouri, Kansas & Texas track, there was, running down-grade and north towards Boonville a Missouri, Kansas & Texas freight train of 35 cars. It was going slowly, say 6 or 7 miles an hour, but making a good deal of noise. As this train on the Missouri, Kansas & Texas track approached Mr. Eppstein, standing on the Missouri Pacific track, he stopped, raised his right arm, put his right hand shieldlike above his eyes, and from thenceforward he gazed attentively and in an attitude of fixed and absorbing interest at the Missouri, Kansas & Texas train for some little while, first as it approached and then as it was passing him. His face and vision were towards the south, and, standing in that rigid and absorbed attitude, with his arm so raised and his hand so employed, appellant's train, as said, slipped on the old man from behind and killed him unannounced. There is not an iota of evidence that he at any time was conscious of the approaching train at his rear or of the imminence of his danger. The petition and the evidence present a case in which decedent put himself voluntarily in a place of peril, and by his act of so putting himself in such peril was guilty of negligence.

The turning and controlling issue in the case we now approach, and that issue is, assuming Mr. Eppstein's negligence in so locating himself, was the place of such character that appellant company had reason to anticipate the presence of persons on the track and thus did it come to owe them a duty to look, to see, and to warn? On this score the evidence, without detailing it witness by witness, tended to show the following further facts: Somewhat north of the place and adjacent to the track are the grounds of a cadet academy, the Kemper School. On the grounds of Kemper School is an athletic field, where athletic training is in progress during springs and autumns, and where athletic games are played. Somewhat south of the place and adjacent to the track, still in the city limits, are the fair grounds, where, at least up to a year or so prior to the accident, fairs were held. At the corner of these fair grounds, next to the track and closest to the business portions of the town, is a gap in the

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fair grounds fence. This fence is of wire, and some of its intermediate strands have either been cut out or else they have been elevated and nailed to a post, as we interpret the evidence, so as to permit ingress to and egress from said fair grounds by pedestrians. One of the witnesses described this gap in this way: "The wires is nailed up in the fence with a post in there to hold the wires up, and there is a gap where everybody passes through there." One witness suggested there had been a gate there, but the suggestion is put into the record more as a guess than otherwise. It is not shown who put these wires in that condition, or who made that gap; but the evidence indicates that the wires were in such manifest fixed position so long as three or four years, and likely more. Leading into the fair grounds, through this gap, from appellant's railroad track, is a well-worn footpath, referred to by some of the witnesses as a "big path." The testimony is conclusive that the path was worn by footmen, and the broad fact is inferable that it was made by pedestrians using the track of appellant from the business portions of Boonville to the said corner of the fair grounds, where they diverged and went into the fair grounds or elsewhere. But the record does not leave the fact alone to inference, because it was shown that, when the fair grounds were in use at any time, many people (estimated at hundreds daily) used appellant's track and said path to go to said grounds. It was shown, furthermore, that a similar use was made of the track from the business portion of the city by those interested in athletic events occurring on the Kemper School grounds. This part of the record is summarized by appellant in its statement, as follows: "The evidence also tends to show that during the springtime persons would walk along this track going to baseball games at the Kemper School grounds, and in the fall of the year persons would go along this track to witness football games." While indefinite in extent, and the product somewhat of inference, it may be said to be established that there was also a more or less constant use of this track for an extended time by Boonville people for purposes of recreation and pleasure, as well as for business to those who had business in that direction. Such use by these people was more pronounced in fine weather and still more pronounced on Sundays. It was shown, however, that appellant ran no regular train over its branch road to Tipton on Sundays, but did run specials now and then. On the other hand, the record is silent as to whether or not the crew of the regular, weekday train ran the Sunday specials. On top of the use heretofore indicated, there was that indefinite and sporadic use of the track by pedestrians common to all railroad tracks, maybe, when the dirt roads were wet and heavy and the railroad presented a dry pike or path. The latter use, on which we lay no controlling stress, was confined to farmers who came to town on foot in muddy weather, and to those wandering unfortunates, designated rudely by one witness as "bums and hobos." About

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a quarter of a mile west of appellant's track was a public road, and about a quarter of a mile east was another. The houses in the neighborhood were built mainly along these public roads, and the immediate land about the place of the accident was cut up into parcels and put to the use usual in the suburbs of old-settled towns of the size of Boonville in Missouri. We gather, also, from the evidence, that the railroad right of way was fenced, and we infer that the two side fences included both the Missouri, Kansas & Tennessee and the Missouri Pacific tracks. The record shows, furthermore, that no signs had been posted to warn the public against trespassing on appellant's track until after the deplorable death of Mr. Eppstein. If appellant at any time had taken any steps to prevent the use of its track by pedestrians as hereinbefore set forth, other than by posting trespass notices subsequent to the accident, such fact is not made to appear. The ordinance regulating the rate of speed and requiring a bell constantly to be rung on a moving locomotive in the city limits, pleaded in the petition, was put in evidence.

1. Should the case have been allowed to go to the jury at all on the showing made by this record? In other words, should appellant's demurrer have been allowed? Based on a self-evident premise, it may, in a large way, be laid down that the sacredness, the dignity, of human life is the master key in unlocking the problems of jurisprudence the central fact in all law, human or divine, furnishing the crowning object of civilized government, and the essential purpose and need of the very existence of courts. Liberty, property, and the pursuit of happiness are mere collateral offshoots, all, to that parent stem—the flowers blooming from that stalk. Far be from us the day when light indifference, a callousness born of the capricious needs of commerce, whereby the public conscience and sensibility may be scared as with a hot iron, allows that sacredness to be lowered or whittled away by the negligent omission of ordinary care. Controlled by that touchstone, leavened by that leaven, a great cloud of decisions of this court promulgated, inter alia, the following rules governing cases brought under our statutes, such as the one at bar, viz.: (a) Where one (at least one sui juris) is in a place of safety and therefrom negligently moves to a place of danger, so immediately before that danger that it may not be averted by the use of ordinary care by those controlling the dangerous instrumentality, and is killed, his death is not actionable. (b) Where one unconscious of his peril has negligently placed himself in a position of danger, so far away from that danger that his death may be averted by the use of ordinary care by those who see him and who control the dangerous instrumentality, his death is actionable. (c) If, under the latter hypothetical proposition, the person so exposing himself to danger is at a place where those controlling the dangerous instrumentality have no reason to anticipate the presence of people, and is killed without being seen in time to have avoided his

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death by the use of ordinary care, his death is not actionable. (d) But if, under the same hypothetical proposition, the person so exposing himself to danger (for example, danger from a going locomotive) is at a place where those controlling the dangerous instrumentality have no reason to expect a clear track, but have reason to expect the presence of people, then it makes no difference whether such person is seen or not, if to look is to see, and if thereafter by the use of ordinary care the danger may be averted.

In this case it is stoutly affirmed on one side and as stoutly denied on the other that the latter principle applies to the facts. Does the principle apply? We think it does. In a given case there might be such scant or neutral evidence of public user of a portion of a track, mere sporadic instances thereof, that a court, as a matter of law, would determine that the servants of a railroad company charged with the running of a locomotive engine had no duty to look and see. In such case, unless they did see the dangerous exposure of a person on the track, and in time to avert injuring him by the use of ordinary care, the court would take the case from the jury. On the other hand, there might well be a case where the public user of a portion of the track by pedestrians was so constant, so pronounced, so manifest, and uncontradicted that there could be no two opinions about it among reasonable men, and the court, as a matter of law, might assume that locomotive operatives owed a duty to the public to be on the lookout there. Then, too, there might be a case lying between said extremes, and in our opinion, this is one, where the use by the public of the track was of such sort that it became a mixed question of law and fact whether those running a locomotive engine had reason to anticipate the presence of people, and in such case that issue should be submitted to the jury, as a fact to be determined by it. Liability in each instance is predicated of knowledge or notice of the user. Such notice may be proved by the existence of paths well worn by human feet, and by gaps, stiles, and gates appurtenant to such path, by the long continued going to and fro of people more or less constantly, and by the proved presence of schools, places of recreation, etc., and the use of the track by visiting pedestrians and habitues, all of which elements are present in this case to an extent of such significance as made the issue, in our opinion, one for the triors of fact to decide. Confronted by the evidence indicating notice and knowledge, appellant remained silent, and in the practical administration of the law the everyday significance of that silence should not be ignored.

Assuming, then, as found by the jury, that Mr. Eppstein was killed at a place where appellant's servants had reason to anticipate the presence of people on its track, appellant is confronted with the duty of using ordinary care to see and ordinary care to prevent injuring him. How was that present and humane duty performed? It was not performed in this instance, because the

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ordinance requiring a bell to be rung was disobeyed, and because, moreover, appellant's servants, had they seen Mr. Eppstein, would have had no call to assume that he heard the noise of their train, or would step from the track to avoid danger. And this is so for the reason that the mere running noise of their train might well be submerged in the greater running noise of the heavy freight on the adjoining track. It is so for the further reason that his attitude, his arm, his hand, the direction of his vision, would demonstrate to any reasonable man that he was quite engrossed in the passage of the Missouri, Kansas & Texas train and oblivious to all else. Appellant's servants, with plenty of space and plenty of time to see, with no obstruction in the way of seeing, warned by his preoccupied attitude and conduct of the fact that he was oblivious to their approach, owed him, we think, the simple and easy duty to tell him they at once purposed occupying the identical spot he was on with their ponderous engine. This is not requiring anything extraordinary at their hands. A twist of the wrist would have done it presumably. Indeed, the absence of all warning signals, by whistle or bell, would indicate to us, as a charitable view, that they did not see him, but were possibly doing precisely what he was doing, namely, watching the Missouri, Kansas & Texas train; and the silence of appellant in this particular when confronted by the evidence in this case pertaining to the straight track, the peculiar attitude of this venerable man at the time he was struck and before, and the other facts in proof, must be held to indicate either an inability or an indisposition to controvert respondent's array of facts. That this case should have been allowed to go to the jury we think is within the reasoning of many of our decisions, of which a sample must suffice. *Morgan v. Railway*, 159 Mo. 262, 60 S. W. 195; *Fearons v. Railway*, 180 Mo. 208, 79 S. W. 394, where the cases are reviewed, differentiated, and applied. See, also, the remarks of Gantt, J., *arguendo*, in *Scullin v. Railroad*, 184 Mo., *loc. cit.* 705, 707, 83 S. W. 760.

2. Was the case properly put to the jury in respondent's declarations of law? Only one of respondent's instructions is criticised, and that one is this: "The jury are instructed that it is admitted that plaintiff is the widow of Veit Eppstein, deceased, and that suit was begun within six months after his death; and if the jury believe from the evidence that said Eppstein was, on or about the 7th day of March, 1902, struck by a locomotive engine then being run on defendant's railroad by its servants and employees, and that he was thereby so injured that his death resulted therefrom, and that at the place where said Eppstein was struck many people were at that time, and had been for several years prior thereto, accustomed to use said track as a footpath to and from points in the southern part of the city of Boonville and beyond, and that said track had been used in this way continuously for many years, and that defendant's servants

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and agents in charge of said train could reasonably have expected to find persons on said track at that place, on account of the frequent and continuous use thereof by footmen, and that no signal or warning was given by defendant's servants and agents in charge of its engine as it approached the deceased, and no efforts were made by them to prevent said injury, and that said Eppstein was not conscious that said train was coming towards him, and if the jury shall further find that defendant's servants and agents could, by the exercise of reasonable care and diligence, have seen said Eppstein upon said track a sufficient distance ahead of said train, so that by giving such signals or warnings, or taking such other action as a reasonably prudent man would have done under the circumstances, said accident could have been avoided, but that defendant's agents and servants in charge of said train through their carelessness and negligence either failed to observe said Eppstein upon said track, or failed to give proper signals or warnings, or to take such other action as a reasonably prudent man would have done to avoid said injury, then the jury should find the issues for the plaintiff, notwithstanding they may believe from the evidence that said Eppstein was on said railroad track without legal right, and was himself guilty of negligence in being there."

The criticism leveled at this instruction, and which criticism to some extent is embodied in declarations of law asked for by appellant and refused, is that it ignored the existence of an alleged concurrent act of negligence on the part of decedent. But, in answer thereto, it must be remembered the case and the instruction proceed on the theory that decedent was negligent in placing himself in a position of danger, and that thereafter, being oblivious to the danger, the continuing negligence of appellant, which might have been avoided by ordinary care, destroyed him. No rule, adjusting the relative rights of the carrier and persons on the track, may be laid down which would fit all cases. Some courts have tried to meet the difficulty with the doctrine of comparative negligences, others by the "last chance" doctrine, but all the cases recognize that though one is where he ought not to be, yet another may not negligently kill him. And that is precisely this case, and (at bottom) the humanitarian rule. The instruction, in our opinion, was well enough, and the instructions of appellant announcing a contrary doctrine, as applying to the facts in judgment, were properly disallowed.

3. Another matter is brought to our attention which, were the record in a different form, would present a serious question indeed. Speaking for itself, the record shows as follows: "Mr. G. W. Pendelton, of counsel for the plaintiff, in his argument to the jury, said that it was the duty of the court to give the demurrer to the evidence if the plaintiff had no case, and in not giving the demurrer and letting the case go to the jury he decided, in effect, that the plaintiff did have a case. By Mr. Shirk:

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Now, if your honor please, I object to the statement and I want to except to it to the court. The court simply decided, by not giving that demurrer, that the question must be submitted to the jury, and that the court has no right to decide a question that should be submitted to the jury. I except to the statement, and ask the court to reprimand him and withdraw it from the jury. The court made no ruling upon the exception." The learned counsel was inadvertently outside the province of argument to a jury when he discussed to them the significance of a refused instruction. His remarks, therefore, should have been withdrawn, and the trial court should have promptly and in no uncertain way placed this matter right by a ruling and a cautionary reproof. But appellant is in no condition here to ask relief from the incident, because it considered the matter of so little importance as to omit it from its motion for a new trial. Not only so, but the remarks of appellant's counsel, to wit, "I except to the statement," is by the context shown to be merely equivalent to saying "I object to the statement." The phrase, "The court made no ruling upon the exceptions," is by the same context shown to be equivalent to, "The court made no ruling upon the objection." In other words, as known to the practice, no exception was saved to the nonaction of the court. Because the motion for a new trial treats the matter sub silentio, and because no exception was saved to the failure of the court to rule and reprove, the matter in hand cannot be allowed as reversible error.

The cause otherwise was well tried, and accordingly the judgment is affirmed.

PER CURIAM. This cause having been sent to banc, on a dissent expressed in overruling a motion for rehearing, and being reheard in banc, the foregoing divisional opinion of LAMM, J., was adopted as the opinion of the court in banc, and in accordance therewith the judgment of the circuit court is affirmed.

BRACE, C. J., and VALLANT and GANTT, JJ., concur in toto. BURGESS, FOX, and GRAVES, JJ., concur in the result.

HUDSON *v.* ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina, Oct. 2, 1906.)

[55 S. E. Rep. 103.]

Railroads — Licensees—Injuries—Negligence—Evidence.*—Defendant railroad company, moving cars for its own convenience on a spur track, cut a car loose on a downgrade, where by its own momentum

*See foot-notes appended to *Chattanooga S. R. Co. v. Wheeler* (Ga.), 19 R. R. R. 561, 42 Am. & Eng. R. Cas., N. S., 561; foot-notes appended to *Wagner v. Boston Elev. Ry. Co.* (Mass.), 19 R. R. R. 187, 42 Am. & Eng. R. Cas., N. S., 187; foot-notes appended to preceding case.

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it crashed into five other stationary cars, two of which were scotched, on the yard track of an oil mills company with sufficient force to drive the cars from their position and against a bumping post, causing the death of plaintiff's intestate, an employee of the mills, who was standing on the track at the time. Defendant had no one in a position to note the conditions in the yard where the employees of the mills were accustomed, and had a right, to be, and no one was in a position to exercise any control over the detached car. Held, that defendant was guilty of negligence, which was the proximate cause of intestate's death.

Negligence—Proximate Cause.†—Where an act is negligent,* the person committing it is liable for any injury proximately resulting therefrom if he should have anticipated some injury would be liable to happen from the negligence, though the particular manner in which the injury occurred was not reasonably to have been anticipated.

Railroads — Licensees—Death—Contributory Negligence.—Intestate, an employee of an oil mills company, was at work in a room, the door of which opened within 12 feet of a bumping post at the end of the oil mills' railroad switch, on which were certain stationary cars which were being unloaded at the time. Intestate went between the rear car and the bumping post, when he was crushed and killed by a car being switched onto the track without warning or any one to control the same, which caused the stationary cars to move and crush intestate between the bumper of the last car and the post. Held, that intestate was not guilty of contributory negligence as a matter of law.

Appeal from Superior Court, Edgecombe County; Ward, Judge.

Action by Ned Hudson, as administrator of James Hudson, deceased, against the Atlantic Coast Line Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

The evidence on behalf of the plaintiff was as follows: "The defendant had constructed two tracks into the yard of the Edgecombe County Oil Mills for the receipt and delivery of freight of the mills. One of these tracks was along the side of the cotton-seed warehouse, so that the contents of cars on the track could be unloaded into the warehouse, the other track being placed some distance to the left of the first track as you entered

†For the authorities in this series on the question, what is, and is not, the proximate cause of an injury, see foot-notes appended to *Hunter v. Atlantic Coast Line R. Co.* (S. Car.), 20 R. R. R. 55, 43 Am. & Eng. R. Cas., N. S., 55; foot-notes appended to *Central of Georgia Ry. Co. v. Duggan* (Ga.), 19 R. R. R. 803, 42 Am. & Eng. R. Cas., N. S., 803; *Little Rock, etc., Co. v. McCaskill* (Ark.), 19 R. R. R. 513, 42 Am. & Eng. R. Cas., N. S., 513; foot-notes appended to *Warren v. City Electric Ry. Co.* (Mich.), 19 R. R. R. 164, 42 Am. & Eng. R. Cas., N. S., 164; *Byrd v. Southern Express Co.* (N. Car.), 19 R. R. R. 150, 42 Am. & Eng. R. Cas., N. S., 150; *Wise Terminal Co. v. McCormick* (Va.), 19 R. R. R. 23, 42 Am. & Eng. R. Cas., N. S., 23; foot-notes appended to *Louisville & N. R. Co. v. Mounce's Adm'r* (Ky.), 19 R. R. R. 1, 42 Am. & Eng. R. Cas., N. S., 1; *Ryan v. St. Louis Transit Co.* (Mo.), 18 R. R. R. 775, 41 Am. & Eng. R. Cas., N. S., 775; *Chicago City Ry. Co. v. Shaw* (Ill.), 18 R. R. R. 586, 41 Am. & Eng. R. Cas., N. S., 586; foot-notes appended to *Brammer's Adm'r v. Norfolk & W. Ry. Co.* (Va.), 18 R. R. R. 497, 41 Am. & Eng. R. Cas., N. S., 497.

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the yard of the mills. At the end of the first track, and from 3 to 11 inches from one of the buildings of the mills, the defendant had placed a butting or bumping post to stop its cars. The distance between the mill building and this butting post was 3 inches at the bottom and 11 inches at the top, and the rail of the track for several feet approaching the butting post was raised at a very considerable angle, so that it would require force for a car to be shoved back to within 18 inches of the post, and between the butting post and the mill building there were old iron and other debris, so that one could not pass between the mill building and the butting post. The distance from the butting post to the rear end of the coupler of a car placed so that the door of the car would be opposite the door of the cotton-seed warehouse is 27 inches. The distance from the butting post to the western lines of the Southern Oil Company's property, over which the first track is laid, is 108 feet 6 inches. The distance from the butting post to the switch of the railroad company is 371 feet 11 inches. Just beyond the western line of the property of the Edgecombe County Oil Mills is the main street of the town of Tarboro and a plank sidewalk over and across which the track is laid. This street and sidewalk were greatly traveled by the general public. James Hudson, the intestate of the plaintiff, was in the employment of the Edgecombe County Oil Mills, and was a reliable young man earning 85 cents per day; he worked in a huller room, the door of which opened to the left and about 12 feet from the butting post. The evening before the accident the defendant's servants, with the shifting engine, placed two cars of cotton seed of the mills on the track next to its seed warehouse, the doors of the cars being opposite the doors of the seed warehouse, to be unloaded the following morning. These cars were detached from the engine and scotched to prevent them from moving. Three other cars of the F. S. Royster Guano Company were, without the knowledge or consent of the Edgecombe County Oil Mills, and for the convenience of the defendant company, temporarily placed on this track beyond the two cars loaded with seed as described and within the yard of the mills. The day after the two cars of seed had been placed as described for the mills, and while two employees of the mills were in the cars unloading the same, the defendant took another loaded car belonging to the Royster Guano Company from still another track, brought it to the switch, and, while the same was in motion, cut it loose from its engine, and it rolled down this track across the public plankway and the main street of the town and into the yard of the Edgecombe County Oil Mills, with such violence that it ran into the three cars already stationed there and caused them to run back and into the two cars placed for the mills and opposite its seed warehouse, while the cars were being unloaded, and caused them to roll back and into the bumping or butting post. When this car was cut loose from the engine, no signal was given to the

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employees of the mills or to the public that it was coming. No one was on this car that was turned loose. The men on the two cars unloading seed felt a slight jar and the cars moved back about 18 inches. The witness heard some one "holler" and went out and saw James Hudson, the intestate, standing and leaning against the bumper post with his arms on it. He was 'hollering' and badly mashed, mashed sidewise, and died the next day. The cars then rolled back from the post. No one saw Hudson go between the cars and the butting post. The grade from the switch to the scales, some 50 feet within the yard of the Edgecombe County Oil Mills is downgrade, and from the scales to the butting post up grade. A loaded car cut loose at the switch will run back and run into the butting post. There was a fence on the northern and northwestern side of the property of the mills and a great deal of wood was piled along this fence, and there were tanks and other obstructions so that one coming out of the huller room by the side of the butting post could not see an engine or cars at the switch. The cars standing on the track also obstructed his view."

At the close of the evidence there was a motion for nonsuit which was overruled, and the defendant excepted, and in apt time the defendant requested the court to instruct the jury as follows: "(1) That in law, upon the evidence, the injury to James Hudson was an accident, the defendant not being required by law to foresee that a person would pass between the coupling head and the butting post in so short a space, at about 20 inches, and you will answer the issue as to defendant's negligence. 'No.' (2) There being no disputed facts, what is contributory negligence is a question of law, and the court instructs you that, if you believe the evidence, the plaintiff's intestate was guilty of contributory negligence, and you will answer the issue as to contributory negligence 'Yes.' (3) That if you find, from the evidence, the fact to be that James Hudson exposed himself to danger in going between the bumper post and the end of the car, space being 18 or 20 inches, then in law he would be guilty of contributory negligence, and you will answer the issue as to contributory negligence 'Yes.'" The court declined to instruct the jury as requested, and the defendant excepted. Verdict for the plaintiff. Defendant moved for a new trial for errors on the part of the court (1) in refusing the motion to dismiss as on judgment of nonsuit, and (2) for failing to instruct the jury as requested. Motion overruled, and defendant excepted, and appealed from the judgment rendered.

John L. Bridgers, for appellant.

HOKE, J. (after stating the case). There were two objections urged upon our attention by counsel for the appellant: First. That on the entire testimony, if believed, the judge should have held the killing of the intestate to have been an excusable accident. Second. That on such testimony, as a matter of law, the

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intestate was guilty of contributory negligence barring a recovery. In our opinion neither position can be sustained. We have held, in *Ray v. Railroad*, 141 N. C. —, 53 S. E. 622, that it is negligence to back a train into a railroad yard, where passengers are rightfully moving about, without warning and without having some one in a position to observe conditions and to signal the engineer or warn others in case of impending peril. This being a correct position, a fortiori, would it be negligence under the conditions existing here? The evidence shows that the defendant company, moving cars for its own convenience on a spur track, cut loose a car on a down grade where, by its own momentum, it crashed into five other cars, stationary and two of them scotched, in the yard of the Edgecombe County Oil Mills, and with sufficient force to drive these cars from their position and against the bumping post, causing the death of the intestate, an employee of the mills, who was standing on the track at the time. The defendant had no one in a position to ascertain and note conditions in the yard where the employees of the mills were accustomed, and had a right, to be, and no one was in a position to exercise any control over the detached car, even if the peril had been noted.

We agree with the judge below that the undisputed testimony established a negligent act, causing damage on the part of the defendant, and very certain it is that the judge could not have held, as requested by defendant, that, as a matter of law, the defendant was in no way culpable. The reason assigned by the defendant for this contention is not well considered—"that the defendant was not required to foresee that a person would pass between the coupling head and the butting post in so short a space as about 20 inches." When one is guilty of a negligent act causing damage—negligent because some damage was likely to result—he cannot be excused because the damage in the particular case was more serious than he anticipated or different from what he had reason to expect. The doctrine is that "consequences which follow in unbroken sequence, without an intervening efficient cause, from the original wrong are natural, and from such consequences the original wrongdoer must be held responsible even though he could not have foreseen the particular result, provided that, in the exercise of ordinary care, he might have foreseen that some injury would likely follow from his negligence." 16 A. & E. Ency. (1st Ed.) 438. This was substantially held in *Drum v. Miller*, 135 N. C. 204, 47 S. E. 421, 65 L. R. A. 890, 102 Am. St. Rep. 528. In that case a school teacher threw a pencil at a pupil, which struck and injured the pupil's eye, and the judge below, on request of defendant, instructed the jury: "Unless you find from the evidence that a reasonably prudent man might reasonably, or in the exercise of ordinary care, have expected or anticipated that the injury complained of would likely result from the defendant's act in throwing or pitching the pencil, you will answer the first issue

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'No.'” The jury answered the issue “No,” and on appeal Walker, J., for the court, said: “It is not necessary that he should actually intend to do the particular injury which follows, nor indeed any injury at all, because the law in such cases will presume that he intended to do that which is the natural result of his conduct in the one case, and in the other he will be presumed to intend that which, in the exercise of the care of a prudent man, he should see will be followed by injurious consequences. In the case of conduct merely negligent, the question of negligence itself will depend upon the further question whether injurious results should be expected to flow from the particular act. The act, in other words, becomes negligent, in a legal sense, by reason of the ability of a prudent man, in the exercise of ordinary care, to foresee that harmful results will follow its commission. The doctrine is thus expressed and many authorities cited to support it in 21 A. & E. Ency. (2d Ed.) 487: ‘In order, however, that a party may be liable for negligence, it is not necessary that he should have contemplated, or even been able to anticipate, the particular consequences which ensued, or the precise injuries sustained by the plaintiff. It is sufficient if, by the exercise of reasonable care, the defendant might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.’ It is not essential, therefore, in a case like this, in order that the negligence of a party which causes an injury should become actionable, that the injury in the precise form in which it in fact resulted should have been foreseen. It is enough if it now appears to have been a natural and probable consequence of the negligent act, and the parties sought to be charged with liability for the negligence should have foreseen by the exercise of ordinary care that some mischief would be done.” In *Christianson v. Railroad*, 67 Minn. 94, 69 N. W. 640, it was held “that, where an act is negligent, the person committing it is liable for any injury proximately resulting from it, although he could not reasonably have anticipated that the injury would result in the form and way in which it did in fact happen.” And Mitchell, J., in delivering the opinion of the court, said: “It is laid down in many cases and by some text-writers that, in order to warrant a finding that negligence (not wanton) is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligent act, and that it (the injury) was such as might or ought, in the light of attending circumstances, to have been anticipated. Such or similar statements of law have been inadvertently borrowed and repeated in some of the decisions of this court, but never, we think, where the precise point now under consideration was involved. The doctrine contended for by counsel would establish practically the same rule of damages resulting from tort as is applied to damages resulting from breach of contract under the familiar doctrine of *Hadley v.*

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Baxendale, 9 Exch. 341. This mode of stating the law is misleading, if not positively inaccurate. It confounds and mixes the definition of negligence with that of proximate cause. What a man may reasonably anticipate is important and may be decisive in determining whether an act is negligent, but is not at all decisive in determining whether that act is the proximate cause of an injury which ensues. If a person had no reasonable ground to anticipate that a particular act would or might result in any injury to anybody, then of course the act would not be negligent at all; but, if the act itself is negligent, then the person guilty of it is equally liable for all its natural and proximate consequences, whether he could have foreseen them or not. Otherwise expressed, the law is that, if the act is one which the party ought in the exercise of ordinary care to have anticipated was liable to result in injury to others, then he is liable for any injury proximately resulting from it, although he could not have anticipated the particular injury which did happen. Consequences which follow in unbroken sequence, without an intervening cause from the original negligent act, are natural and proximate, and for such consequences the original wrongdoer is responsible, even though he could not have foreseen the particular results which did follow. 1 Bevan, Neg. 97; Hill v. Winsor, 118 Mass. 251; Smith v. Railroad, L. R. 6 C. P. 14." These and other decisions of like import from courts of the highest authority show that the position contended for by the defendant in its prayer for instructions on the first issue cannot be sustained. The jury have found under proper instructions that the defendant was guilty of negligence causing damage; negligent as stated, because it permitted, without any control, a car to run on a down grade into the millyard, where it was likely to, and did, hurt one of the employees of the mills, and it cannot be excused because the employee, being in an unexpected and unusual position, received a greater injury than the defendant had reason to anticipate.

The position of the defendant on the question of contributory negligence is likewise untenable. The intestate, an employee of the mills, was at work in a room, the door of which opened in 12 feet of the place where the killing occurred. He had gone there, no doubt, for his own personal convenience, and the existing conditions gave little or no indication that his temporary position would be one of peril. The cars in the millyard were stationary and scotched, and other employees were at work in them at the time, unloading cotton seed. The circumstances did not require the intestate to anticipate that the defendant company, in disregard of its duty, would recklessly turn a car loose on a down grade, which would run into the yard, drive the stationary cars from their position, and crush out his life. The charge of the court, in leaving it to the jury to determine the question under the rule of ordinary care of a prudent

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man, was as favorable as the defendant had a right to expect. To hold, as requested by the defendant, that the intestate was guilty of contributory negligence as a matter of law, would have been clearly erroneous.

We find no error to the prejudice of the defendant, and the judgment below is affirmed.

ILLINOIS CENT. R. CO. v. WILLIS' ADM'R.

(Court of, Appeals of Kentucky, Oct. 30, 1906.)

[97 S. W. Rep. 21.]

Railroads—Injury to Person on Track—Actions—Venue.—Civ. Code Prac. § 73, provides that an action for an injury to a passenger or his property must be brought in the county in which the defendant or either of the several defendants resides, or in which plaintiff or his property is injured, or in which he resides, if he resides in a county into which the carrier passes. Held, that where intestate was killed while passing over a railroad track, the venue of an action by his administrator was governed by the residence of intestate, and not by the residence of the administrator.

Same—Signals—Injury to Person on Track.*—Where intestate had full knowledge that the train by which he was struck was approaching before he went onto the track in front of it, it was immaterial whether the statutory provision requiring the whistle to be blown and the bell rung was complied with.

Same—Rate of Speed.†—Where intestate heard the train approaching, by which he was struck, and by the exercise of ordinary care could have avoided it, it was immaterial that the train was running at an excessive rate of speed.

Same—Contributory Negligence.‡—Intestate either saw or heard the train by which he was struck approaching, and thought he could cross ahead of it, in order to protect his child and guard his horse, which was on the other side of the track; but, miscalculating the speed of the train, he was struck and killed. Held, that intestate was

*See foot-notes appended to *Garvick v. United Rys. & Elec. Co.* (Md.), 20 R. R. R. 615, 43 Am. & Eng. R. Cas., N. S., 615; foot-notes appended to *Hot Springs St. Ry. Co. v. Hildreth* (Ark.), 18 R. R. R. 168, 41 Am. & Eng. R. Cas., N. S., 168; foot-notes appended to *Carpenter v. Chicago, etc., Ry. Co.* (Iowa), 15 R. R. R. 466, 38 Am. & Eng. R. Cas., N. S., 466.

†For the authorities in this series on the subject of the combined effect of contributory negligence and negligence with respect to speed of train at crossing, see foot-notes appended to *Green v. Missouri Pac. Ry. Co.* (Mo.), 18 R. R. R. 793, 41 Am. & Eng. R. Cas., N. S., 793.

For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to rate of speed of trains approaching crossings, see foot-notes appended to *Golinvaux v. Burlington, etc., R. Co.* (Iowa), 14 R. R. R. 185, 37 Am. & Eng. R. Cas., N. S., 185.

‡For the authorities in this series on the question whether there can be a recovery for injuries sustained in an attempt to cross a railroad track in front of a train or car which is known by the party to be approaching before he makes the attempt, see foot-notes appended to *Colomb v. Portland & B. St. Ry.* (Me.), 20 R. R. R. 293, 43 Am. & Eng. R. Cas., N. S., 293; *Smith v. Minneapolis St. Ry. Co.* (Minn.),

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guilty of contributory negligence, as a matter of law, which precluded a recovery by his administrator, unless those in charge of the train, after discovering intestate, could have stopped the same in time to have prevented the accident.

Same—Relation of Parties—Licensee—Care Required.§—Where intestate crossed defendant's railroad tracks in a depot yard for the purpose of conversing with persons who were loading freight cars, and later attempted to recross in front of an approaching train at a point not a public crossing, he was at most a mere licensee, as to whom the railroad company owed no duty higher than the exercise of ordinary care.

Appeal from Circuit Court, Meade County.

"To be officially reported."

Action by George Willis' administrator against the Illinois Central Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

J. M. Dickerson, Trabue, Doolan & Cox, J. S. Wortham, and J. W. Lewis, for appellants.

S. M. Peyton and Thomas Hamilton, for appellee.

LASSING, J. This is an appeal from the Meade circuit court rendered upon the verdict of a jury in favor of appellee against appellant for causing the death of appellee's intestate, George Willis, at Muldraugh's station, in Meade county, in September, 1904. Deceased was 54 years of age when killed. He had gone to the railroad station for the lady for whom he worked to deliver some boxes of peaches for shipment. He was accompanied by his 10 year old son. The station stands upon the west side of the main track, then comes the passing track east of the main track, and then a spur track east of the passing track. On the day upon which deceased was killed there were two box cars standing upon the spur track for the purpose of being loaded with barrels of apples which were then being shipped from that station. The north end of one of these cars extended north of the north end of the depot, and the south end of the other car reached down to about even with the south end of the depot.

19 R. R. R. 536, 42 Am. & Eng. R. Cas., N S., 536; *Storrs v. Grand Trunk W. Ry. Co.* (Mich.), 19 R. R. R. 194, 42 Am. & Eng. R. Cas., N. S., 194; foot-notes appended to *Louisville & N. R. Co. v. Molloy's Adm'r* (Ky.), 18 R. R. R. 714, 41 Am. & Eng. R. Cas., N. S., 714; *Omaha St. Ry. Co. v. Mathiesen* (Neb.), 18 R. R. R. 509, 41 Am. & Eng. R. Cas., N. S., 509; foot-notes appended to *Wolf v. City & Suburban Ry. Co.* (Ore.), 18 R. R. R. 210, 41 Am. & Eng. R. Cas., N. S., 210.

§For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to persons, other than passengers, at stations and depots on business, see foot-notes appended to *Hickey v. Rio Grande Western Ry. Co.* (Utah), 20 R. R. R. 318, 43 Am. & Eng. R. Cas., N. S., 318; *Chattanooga So. R. Co. v. Wheeler* (Ga.), 19 R. R. R. 561, 42 Am. & Eng. R. Cas., N. S., 561; foot-notes appended to *Southern Ry. Co. v. Goddard* (Ky.), 19 R. R. R. 116, 42 Am. & Eng. R. Cas., N. S., 116; foot-notes appended to *Colorado & S. Ry. Co. v. Sonne* (Colo.), 18 R. R. R. 727, 41 Am. & Eng. R. Cas., N. S., 727.

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South of these two freight cars was a freight car standing on the passing track. It was about noon when deceased reached the station with his peaches. He drove up to the depot and had unloaded a part of them, when a train approached, and evidently fearing that his horse would scare, he drove back from the depot until the train had passed; he then returned to the depot, finished unloading the peaches, received the bill of lading of the agent in charge, left his little son sitting in the wagon, and crossed over the main track and the passing track to where the two freight cars were standing on the spur track and in which the apples were being received for shipment. He climbed up into the car where two men were at work, and asked what they were paying for apples. His little son testified that his father went to that car for the purpose of securing empty barrels from those in charge of the car who worked there, and it may be that deceased had gone there for that purpose. There were two men receiving apples in said car, one named Ellwanger and one named Schoening. They testified that he had no sooner climbed into the car and asked the price of apples, than he heard the approach of a train or engine. He immediately jumped out of the car on the east side of it, ran south around the car on the spur track and around the south end of the car on the passing track out on the main track, where he was struck and killed, being knocked or carried some distance by the engine. Some 10 or 12 witnesses testified that this engine was following some five, six, or less than ten, minutes behind the fast train which had just passed. Most of them say that the engine whistled for the crossing north of the station, and all of them agree that they heard the engine coming, even before they saw it, as it was making an unusual amount of noise, and some of them thought it was a "wrecking engine." Ellwanger and Schoening both say that deceased heard the approaching engine, and his conduct shows beyond question that he heard it, whether it signaled or not, for he jumped out of the car, ran around it and the other car, evidently for the purpose of going over on the road beyond the railroad to look after the safety of his little son whom he had left sitting in the wagon with the horse untied. Proof was introduced showing that the engine was running rapidly, the testimony varying from 25 to 60 miles an hour. Those in charge of the train testified that deceased came upon the track suddenly from behind the box car standing on the passing track; that when they first discovered him upon the track it was impossible to have avoided striking him. Other witnesses testified that from the position in which the engine was upon the track—moving at the rate of speed it was when deceased came upon the track—they did not believe the accident could have been avoided. Muldraugh is not an incorporated town, and the record does not show its size, or the number of people living there. The proof shows that the road makes a curve north of the station, and standing in the track at the station one can see an

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engine 400 feet away; that the public road or crossing is 200 feet north of the station. This was all the proof.

The petition shows that the administrator of the deceased was a resident of Bullitt county, and the deceased was a resident of Meade county, at the time the accident occurred in Meade county as stated. Appellant filed a special demurrer to the jurisdiction of the court, and it was overruled, and an exception saved. At the conclusion of plaintiff's testimony defendant moved for a peremptory instruction, which was overruled. This motion was renewed at the close of all the testimony, and again overruled, to which defendant excepted. Five questions are raised on this appeal: (1) The court erred in refusing to sustain the special demurrer to the jurisdiction. (2) The court erred in admitting incompetent evidence. (3) The court erred in refusing to give a peremptory instruction. (4) The verdict is not sustained by the evidence, and is contrary to law. (5) The jury was not properly instructed.

Appellant complains of the ruling of the trial court in overruling its special demurrer, which was a plea to the jurisdiction of the court. Section 73 of the Civil Code of Practice provides that "an action for an injury to a passenger or his property must be brought in the county in which the defendant or either of several defendants resides; or in which plaintiff or his property is injured, or in which he resides; if he reside in a county into which the carrier passes." Appellant contends that as the administrator, Kelly, does not live in Meade county, and as neither of the defendants live in Meade county, that although the intestate lived in and was killed in Meade county, the action cannot be maintained therein, but must be brought in a county in which one of the defendants lives, or else in Bullitt county, the residence of the administrator, and relies upon section 73 of the Civil Code of Practice to support its contention. We cannot agree to this contention. The word "plaintiff" as used in this section means Willis, the man killed, who speaks through his representative, his administrator. And this is the construction which the lawmakers evidently intended should be placed upon it, and the court properly overruled defendant's demurrer to the jurisdiction.

Upon the question as to whether or not the trial court should have given a peremptory instruction, it will be necessary to notice carefully the proof, and determine from the facts proven whether the deceased was killed through his own negligence and carelessness, or was he exercising ordinary care for his own safety when killed? That he heard the approach of the engine which killed him there cannot be the slightest doubt when we consider the testimony of the witnesses Ellwanger and Schoening and the action and conduct of the deceased immediately after they say he heard the train. His every movement shows that he heard it; that he knew and realized it was rapidly approaching, and he evidently remembered or recalled the

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fact that he had left his little son in the wagon with the horse untied, over in the road behind the depot. And his efforts were directed towards reaching his son, and looking after his safety. It is immaterial, then, for the purposes of this suit whether the whistle was sounded or the bell rung, for this statutory provision is required to notify the public who may be on the highway at railroad crossings or other dangerous places of the approach of the train. In the case of *Helm v. L. & N. R. R. Co.*, 17 Ky. Law Rep. 1004, the court held, as stated in the syllabus, as follows: "The appellant having seen the approaching train, he is not entitled to recover damages from the railroad company for an injury sustained by the train striking him while he was attempting to cross the track in front of the moving train. Though it was the duty of the engineer to sound his whistle some distance from the station, still his failure to do so did not entitle the appellant to recover damages for the injury sustained, since he negligently attempted to cross the track in front of the train after discovering its approach." And further discussing the question in this case, the court said: "It seems to us that if there was a failure to sound the whistle, such failure would not entitle the appellant to recover. The object in requiring the whistle to be sounded and bells to be rung is to give notice of the approach of the train. The appellant discovered the train was coming, and he negligently attempted to cross the track in front of it. It cannot be said that a failure to sound the whistle was the proximate cause of the injury." Nor can appellee complain of the rate of speed at which the train or engine was going at the time that his intestate was killed, for, as said by Judge Holt in the case of *Craddock v. L. & N. R. R. Co.*, 16 S. W. 125, 13 Ky. Law Rep. 18, "conceding the rate of speed, considering the place, was unreasonable, yet this did not authorize the appellant to negligently throw himself in the way of it, when he had ample warning of its approach, and then claim damages for any resulting injury." In this case deceased heard the train, and by the exercise of any degree of care could have seen it, as the proof shows there was nothing in his way to obstruct his view when he reached a point between the passing track and the main track. In the case of *L. & N. R. R. Co. v. Taffe's Adm'r*, 50 S. W. 850, 21 Ky. Law Rep. 64, the court held: "that it was the duty of the decedent, if he had notice of the approach of the train to the station, to exercise reasonable care to ascertain the proximity of the train to the station, and to be careful not to expose himself to any danger by walking upon or near the track upon which the train was approaching, and it was his duty, if he heard the train whistle, indicating its approach to the station, to be on the lookout for same, and to keep himself out of danger." In the case of *Gresham's Adm'r v. L. & N. R. R. Co.*, 24 S. W. 869, 15 Ky. Law Rep. 599, the court said: "It is evident that the boy saw the train before he crossed the track, and that he believed he could cross in safety

before it could reach him, and he doubtless could have succeeded in the attempt but for the fact that he got his foot hung and fell. It is now contended that if the train had stopped, as required by the statute, before it got to the crossing, Gresham would have had time to recover from his fall, and have crossed in safety, and that because it failed to stop, as required, the killing was the result of willful negligence. * * * Here, as said, Gresham evidently saw the train coming at a rapid rate of speed, and close at hand, and, believing that he could make the crossing in safety, made the venture, and he would doubtless have succeeded but for the fact that he fell, which caused him to be overtaken and killed. In this there is no negligence of the appellee in reference to him. The negligence that caused the death was his."

In the case before us, deceased evidently saw the engine approaching. He thought he could cross over the track before it reached him. He made the venture, miscalculated the speed at which the train was approaching, and was killed. The fault was his, unless those in charge of the train after they discovered him could have stopped the train in time to have prevented the accident. In the case of *Johnson's Adm'r v. L. & N. R. Co.*, 91 Ky. 651, 25 S. W. 754, the court said: "When an adult person steps upon a railroad track in front of and in full view of an approaching train, those in charge have the right to presume that his own consciousness of danger will cause him to leave it before the train reaches him; and, in case the person is deaf, or otherwise deficient in his faculties, so as to render him unconscious of the impending danger, the knowledge of such infirmity must be brought home to those in charge of the train before they or the railroad company can be made liable." Following the rule laid down in this case, if those in charge of the train which killed him had seen him upon the track as they approached the depot, they would have had the right to have expected him to get off of the track in time to have prevented the accident. The proof, however, shows that they did not see him upon the track, and, in fact, he did not come upon the track until the train was almost upon him, when it was impossible to have done anything to have prevented the accident. The place at which deceased was killed was not on a public crossing, and he had no contractual relations with the company as shown by the proof. Considering the business for which he crossed track to the spur track in the light most favorable to him, he was at most a licensee and the company owed him no duty higher than the exercise of ordinary care to have prevented the accident. We are of opinion that the facts in this case authorized and warranted a peremptory instruction to the jury to find for the defendants.

The judgment is reversed with instructions to grant a new trial in conformity with this opinion.

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(Supreme Court of Iowa, Nov. 13, 1906.)

[109 N. W. Rep. 618.]

Trial—Instructions—Reference to Evidence.—In an action for personal injuries, it was error for the court to suggest in an instruction that the jury should take into consideration certain facts constituting circumstances from which negligence might be inferred, and omit reference to facts favorable to defendant.

Same—Application to Evidence.—In an action against a street railroad for the death of a member of the fire department in a collision between a hose wagon and a car, an instruction that the jury must consider whether the motorman was negligent in not stopping or checking the speed of the car, if he could have stopped it, was erroneous; there being no question under the evidence as to the ability of the motorman to stop the car or check its speed in time to have avoided the accident, but the question being whether he was negligent in not doing so.

Street Railroads—Collision with Vehicle—Action—Evidence—Admissibility.—In an action against a street railroad for the death of a member of a municipal fire department in a collision between a hose wagon and a car, while the wagon was crossing the track, it was proper to admit in evidence a section of the city ordinances providing that apparatus of the fire department responding to an alarm should have the right of way.

Same—Regulations as to Right of Way.—Where a section of a city ordinance provided that the apparatus of the fire department should have the right of way while going to and at any fire, and another section provided that the cars of a street railroad company should be entitled to the track, and that in all cases where any team should meet or be overtaken, the team or vehicle should give way to the car, the former section was controlling as to the right of way as between a street car and fire apparatus responding to an alarm.

Same—Action for Injuries—Instructions.—Where, in an action against a street railroad for the death of a member of a municipal fire department in a collision between a hose wagon and a car, a city ordinance giving fire apparatus the right of way while going to and at any fire was admitted in evidence, it was not error to set out the ordinance in an instruction in which the jury were informed as to the legal effect of it.

Same—Evidence—Admissibility.—In an action against a street railroad for the death of a member of a municipal fire department in a collision between a hose wagon and a car, it was proper to refuse to admit in evidence on behalf of plaintiff rules of the fire department intended for the guidance of members thereof and issued only to them.

Negligence—Imputed Negligence.*—In an action against a street railroad for the death of a member of a municipal fire department, who was riding on a hose wagon, in a collision between the wagon and the car, the negligence of the driver of the wagon was not imputable to decedent.

Appeal—Harmless Error—Admission of Evidence.—In an action

*For the authorities in this series on the subject of imputed negligence, see foot-notes appended to *Kane v. Boston Elevated Ry. Co.* (Mass.), 20 R. R. R. 581, 43 Am. & Eng. R. Cas., N. S., 581; foot-notes appended to *Bresee v. Los Angeles Traction Co.* (Cal.), 20 R. R. R. 537, 43 Am. & Eng. R. Cas., N. S., 537; foot-notes appended to *Jacksonville Elec. Co. v. Adams* (Fla.), 20 R. R. R. 295, 43 Am. & Eng. R. Cas., N. S., 295.

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against a street railroad for the death of a fireman in a collision between a hose wagon and a car, a witness was interrogated as to the distance within which a car could be stopped with the use of a different kind of controller than that used, but subsequently, on the request of counsel who introduced the witness, his testimony was stricken, and the jury instructed to disregard it. After the witness had fixed a shorter distance than that fixed by the expert witnesses previously testifying, he changed his testimony so that it substantially accorded with that of the other witnesses. Held that, under the circumstances, there was no error resulting from the admission of the testimony of the witness.

Trial—Instructions—Issues.—In an action against a street railroad for the death of a fireman in a collision between a hose wagon and a car, it was not error to refuse an instruction that, in determining whether plaintiff's intestate was guilty of contributory negligence, the jury should not take into account the instinct of self-preservation, where the attention of the jury was not in any way called to such doctrine.

Appeal from District Court, Polk County; Hugh Brennan, Judge.

Action to recover damages resulting to the estate of plaintiff's intestate by reason of his death, due to injuries received in a collision between a car operated by the defendant company and a hose wagon, belonging to the fire department of the city of Des Moines, on which the deceased, a member of the department, was riding. There was a verdict for plaintiff, and from the judgment rendered thereon defendant appeals. Reversed.

N. T. Guernse, for appellant.

Thomas A. Cheshire, for appellee.

McCLAIN, C. J. The facts appearing in the record which are essential to the determination of the questions of law raised on this appeal are as follows: Plaintiff's intestate was a member of the paid fire department of the city of Des Moines, and in response to a fire alarm, about half past 10 in the morning, with eight other members of the department, he started on a hose wagon from the fire station on Eighth street going north. One Nagle was the driver of the wagon. Plaintiff's intestate rode in his proper place on a running board or step on the west side of the wagon, facing east and near the rear end. As the wagon approached the crossing of Grand avenue running east and west, on which there was a double track of defendant's railway, the driver saw a car coming from the west, and without checking the speed of the wagon drove on across the track on which the car was approaching. The car struck the rear wheel on the west side of the wagon, and deceased was violently thrown to the pavement and his skull was fractured. From this injury he died within a few hours.

1. After stating very elaborately and in great detail the claims of the parties as to the facts bearing upon the question of the negligence of the defendant's motorman, in charge of the car which collided with the hose wagon on which plaintiff's intestate

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was riding, and defining negligence, the court instructed the jury to consider "whether or not the motorman having charge of the running and operating of the car in question was negligent or not in not stopping or checking the speed of the car before the collision with the fire hose wagon occurred"; and he then proceeded to detail a variety of circumstances which the evidence for plaintiff tended to establish, such as the clearness and calmness of the day, the ringing of the bell on the hose wagon, and the distance at which such bell might be heard, the rate of speed of the wagon, etc., none of which were controlling on the question of the motorman's negligence. And he concluded the instruction with this sentence: "After carefully considering these facts, if they be facts, and all other facts and circumstances proved on the trial, if you believe from the preponderance of the evidence that the motorman by the use of the means at his command could have stopped the car, or checked the speed thereof, in time to have avoided the accident, and that he failed to do so, that would be negligence on his part; and his negligence, if he was so negligent, would be the negligence of the defendant, and your verdict should be for the plaintiff, unless you find the deceased, B. McBride, was negligent, and that his own negligence contributed to his injury in any degree, in which case you would find for the defendant." The first objection urged to this instruction as a whole is that therein the court called to the attention of the jury the facts which the evidence tended to establish favorable to plaintiff's recovery, and omitted special reference to those relating to defendant's theory of the accident. This objection we think was well taken. An instruction was asked on behalf of defendant, calling attention to other circumstances which the evidence tended to establish, which should have been considered as bearing on the motorman's negligence, and which were favorable to defendant's contentions in the case. It was clearly improper for the court to thus emphasize the circumstances from which negligence might be inferred, and omit any reference to circumstances tending to support the opposite inference. Perhaps the court might properly have omitted to catalogue the circumstances which the testimony tended to establish bearing on the question of negligence, and simply have referred in a general way to the facts and circumstances proved on the trial. But in suggesting to the jury that they should take into consideration some of the circumstances which were favorable to the plaintiff, and omitting reference to others favorable to defendant, he put the case unfairly to the jury.

Another serious objection to the instruction is that the portion thereof above set out withdraws from the jury the question whether the motorman was negligent in not stopping the car or checking the speed thereof in time to have avoided the accident. There could be no question under the evidence as to the ability of the motorman by the use of the means at his command to

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stop the car or check the speed thereof in time to have avoided the accident, if he had endeavored to do so a sufficient length of time before the accident occurred, nor was there any doubt that he failed to stop the car or check its speed so as to prevent the result of a collision; and the court specifically instructs the jury that this ability on the part of the motorman and his failure to act constituted negligence. The real question in the case was, not whether the motorman could have stopped the car, but whether he was negligent in not doing so; and this was a question for the jury, and not for the court. Had the evidence shown without controversy that the motorman, in the exercise of care, could and should have anticipated the collision long enough beforehand to enable him to stop the car or check its speed so as to avoid the accident, then the instruction might have been correct. But the facts were in dispute. There were circumstances supporting either conclusion, and the question of negligence should have been left to the jury. It is no answer to this position to say that in the first part of the instruction the jury were told that they must consider whether or not the motorman was negligent in not stopping or checking the speed of the car. After this general statement, the court proceeded to enumerate a large number of circumstances indicating that the motorman was negligent, and then told the jury that if these circumstances were found to be established, and they believed from these and other circumstances proved on the trial that the motorman could have stopped the car, he was negligent. It was not the physical ability of the motorman to stop or check the speed of the car that was in question, but his failure to use due care. The instructions as a whole are lengthy and intricate in their statements, and the one now specially under consideration is particularly obscure, and the bald statement at its conclusion that the motorman was negligent if he could have stopped or checked the speed of the car in time to avoid the accident, and failed to do so, may well have been seized upon by the jury as the solution of the whole difficulty. We reach the conclusion that in the two respects pointed out the instruction was erroneous and misleading.

2. Over the defendant's objection the court allowed the plaintiff to introduce in evidence a section of the city ordinances relating to the fire department as follows: "Sec. 353. Fire Department Not to be Obstructed. Sec. 8. The engines, hose carriages, officers, men and apparatus of the fire department, shall have the right of way while going to and at any fire, and any person willfully obstructing the firemen in the performance of their duty shall be deemed guilty of a misdemeanor and be liable to punishment for such offense." And the court refused on plaintiff's objection to allow the defendant to introduce a section of the city ordinance relating to the operation by defendant of its street cars as follows: "Sec. 1304. Penalty. Sec. 8. The cars of said company shall be entitled to the track, and in all cases

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where any team or vehicle shall meet or be overtaken upon either of the street railways in said city, such team or vehicle shall give way to said car; nor shall any person willfully or maliciously obstruct, hinder, or interfere with any of said railway cars, by placing, driving, or stopping, or causing to be placed, or driven in a slow pace, or stopped, any team, vehicle or other obstacle in, upon, across, along, or near the tracks of said railway, or either of them, after being notified by the driver or conductor by the ringing of the car bell, or otherwise, and whoever shall willfully violate any of the provisions of this section shall, upon conviction thereof before the police judge of said city, be fined in any sum not less than \$5 nor more than \$50." With reference to the section of the ordinances which was admitted in evidence, the court, after quoting it in an instruction, charged as follows: "You are instructed that, while the defendant had the right to operate its cars upon the streets of the city, it was bound to use ordinary care and caution in the operation thereof. And if you find from the evidence that the hose wagon in question was being driven upon said street in response to the alarm of fire, the driver of the hose wagon, the decedent riding upon such wagon, and the defendant are presumed to have been familiar with this ordinance; and in view of this ordinance the hose wagon was entitled to the right of way, and the conduct of the driver and the person riding upon the hose wagon, as well as the defendant, must be judged in the light of the conditions of this ordinance. And if you find that the defendant failed to use ordinary care and caution in stopping its car or checking the speed thereof, and that that was the proximate cause of the accident and the injury which resulted in the death of intestate, you will find for the plaintiff, unless you further find that intestate was himself guilty of negligence which contributed to his injury."

The section of the ordinance first quoted above was properly admitted as bearing on the question of the duty of the motorman to assume that the hose wagon would not be stopped for the purpose of allowing the car to pass by in front of it, but that on the other hand the driver of the hose wagon would proceed on the theory that he had the prior right at the crossing. While the ordinance does not require a higher degree of care on the part of the motorman with reference to the firemen on the hose wagon than with reference to any other person, it would charge the motorman with knowledge of a fact very material in determining whether he exercised the care required under the circumstances. The section of the ordinance relating to the operation of defendant's cars and giving them the right of way as to teams or vehicles on the street was properly rejected, because it had no application to the case of a hose wagon belonging to the fire department. The fire department ordinance was later in enactment than the street car ordinance, and its provisions would control as to the specific subject-matter referred to therein. It is argued that these two ordinances were subsequently in-

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cluded in the Revised Ordinances of the city and therefore were to be construed together, but it appears that the so-called Revision of the Ordinances of 1900, published in 1904, was not an enactment, but merely a republication, and we do not think that such a republication would affect the rule of construction otherwise applicable that the later ordinance would control the former as to any subject-matter covered by the subsequent enactment. However this may be, the specific provision of the ordinance as to the engines and carriages of the fire department constitute exceptions to the general provisions relating to teams and vehicles. That the provisions of a statute or ordinance as to a specific subject-matter will prevail over general provisions which, but for the specific provision on the same subject, would have covered the subject-matter of the latter, is a proposition too elementary to require discussion. In *Christy v. Des Moines City R. Co.*, 126 Iowa, 428, 102 N. W. 194, it was held that the ordinances of the city regulating the conduct of the employees of the street railway company in operating its road were properly rejected when offered in evidence; but in that case the question was whether plaintiff, seeking to recover for personal injuries received by reason of negligence of the street car employees, could establish the measure of their duty by showing the provisions of the ordinances on the subject, and all that was held was that the duties imposed by the ordinances were not different from those imposed by law, and therefore the provisions of the ordinances were wholly immaterial. We are satisfied with the rulings of the court admitting the section of the ordinances relating to the fire department and excluding the section relating to the operation of street cars with reference to teams and vehicles in general.

It is objected that the court should have construed the section of the fire department ordinance, and not submitted it to the jury for their construction. But this, we think, is just what the court did. Perhaps it was unnecessary to set out the section of the ordinance in the instruction, but the court proceeded to tell the jury what was the effect of the ordinance, and there could have been no prejudicial error in setting out its language. In this connection may be noticed the ruling of the court sustaining an objection on behalf of the plaintiff to the offer in evidence of the rules of the fire department offered by the defendant. These rules were intended for the guidance of members of the department, and were issued only to them. They were not issued for the purpose of advising the public what the conduct of the firemen would be under any particular emergency, and the public had no reason to know what they were or to rely upon them. The motorman of the defendant cannot be assumed to have acted with reference to or in reliance on any such rules, for he had no reason to know of their existence, and there is nothing to indicate that he did know what they were, or rely upon them in any way. These rules could not, therefore, have had any

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bearing on the question whether the motorman was negligent. The bearing of the rules on the conduct of the deceased and of the driver of the hose wagon will hereafter be considered.

3. The jurors were instructed that, in determining whether the deceased was negligent in any way contributing to his injuries, so as to defeat recovery, they need not consider the action of the driver of the team drawing the hose wagon, as his action and conduct could not be imputed to the deceased. The evidence shows that deceased was near the rear end of the hose wagon, standing on a running board and holding onto a railing provided for the purpose, while the driver was on the front seat, guiding the horses and urging them onward in response to the fire call, and it is quite apparent that deceased was in no way responsible for the action of the driver, unless, from the mere fact that the deceased was being transported on the hose wagon managed by the driver, the conduct of the latter was to be imputed to the former. And counsel for appellant concede this to be the situation; for, in a requested instruction, the rule is announced that, if the proximate cause of the collision was the negligence of the driver, and such collision would not have occurred, had the driver exercised reasonable and ordinary care, then the plaintiff could not recover. The bald question is thus presented whether the negligence of the driver of the hose wagon, if there was any negligence on his part contributing in any way to the injury, should be imputed to deceased and defeat plaintiff's recovery. This court has, in several cases, refused to countenance the doctrine of imputed negligence. *Nesbit v. Town of Garner*, 75 Iowa, 314, 39 N. W. 516, 1 L. R. A. 152, 9 Am. St. Rep. 486; *Wymore v. Mahaska County*, 78 Iowa, 396, 43 N. W. 264, 6 L. R. A. 545, 16 Am. St. Rep. 449; *Larkin v. Burlington, C. R. & N. R. Co.*, 85 Iowa, 492, 52 N. W. 480; *Bailey v. Centerville*, 115 Iowa, 271, 88 N. W. 379; *Willfong v. Omaha & St. L. R. Co.*, 116 Iowa, 548, 90 N. W. 358. It is argued, however, that the case before us falls within the rule of a class of cases in which imputed negligence or something akin to it is recognized, and that these cases are not only not expressly overruled, but are regarded as still announcing the law of this state. The leading case of this group is *Payne v. Chicago, R. I. & P. R. Co.*, 39 Iowa, 523, which, with other cases following it, is commented on in *Nesbit v. Town of Garner*, *supra*. The ground of the decision in the *Payne* Case is very briefly and inadequately stated, and that case has been cited in other courts (see *Dean v. Pennsylvania R. Co.*, 129 Pa. 514, 18 Atl. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733; *New York, P. & N. R. Co. v. Cooper*, 85 Va. 939, 9 S. E. 321; *Noyes v. Boscawen*, 64 N. H. 361, 10 Atl. 690, 10 Am. St. Rep. 410) as supporting the general rule of imputed negligence announced in *Thorogood v. Bryan*, 8 C. B. 114, which has been expressly repudiated in practically all the courts of last resort in this country in which the question has been considered. See *Little v. Hack-*

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ett, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652; *Union Pacific R. Co. v. Lapsley*, 51 Fed. 174, 2 C. C. A. 149, 16 L. R. A. 800; *Kowalski v. Chicago & G. W. R. Co.* (C. C.) 84 Fed. 586; *Robinson v. New York C. & H. R. R. Co.*, 66 N. Y. 11, 23 Am. Rep. 1, and note; 1 Thompson, Negligence (2d Ed.) §§ 77, 298, 497. But in the *Nesbit Case* this court explains the *Payne Case* and other cases like it as announcing the general rule that, where several persons are engaged in a common enterprise in the carrying on of which each is participating, the negligence of one of them may be imputed to the others. It is the contention of counsel for appellant in this case that the common enterprise doctrine should be applied. We are satisfied, however, that the facts do not afford the slightest occasion for applying or even discussing the common enterprise rule. The deceased was not riding on the hose wagon in the prosecution of any common enterprise in which he and the other members of the fire department had voluntarily engaged, but in the pursuance of his individual duty as a member of the fire department and in that capacity a servant of the city. He had nothing to do with the selection of the driver, and he had no control over his acts. Under such circumstances it has been frequently held by other courts that there is no relation of common enterprise which would justify the imputation to the deceased of any negligence on the part of the driver of the hose wagon. See the following cases, which seem to be exactly in point: *Geary v. Metropolitan St. R. Co.* (Sup.) 82 N. Y. S. 1016; *Bailey v. Jourdan* (Sup.) 46 N. Y. S. 299; *Elyton Land Co. v. Mingea*, 89 Ala. 521, 7 South. 666; *Birmingham R. & E. L. Co. v. Baker*, 132 Ala. 507, 31 South. 618; *Houston City R. Co. v. Reichart* (Tex. Civ. App.) 27 S. W. 918, on appeal 87 Tex. 539, 29 S. W. 1040.

The rules of the fire department offered in evidence had no bearing on this question. So far as it appears from the record, the sections relate to the conduct of the driver and the captain or assistant chief, and they do not purport to authorize another fireman riding on the hose wagon to exercise any control over the driver. So far as they affect the conduct of the driver, even if admissible for the purpose of showing his negligence, they would not be material as affecting the deceased, in view of the conclusion just indicated that negligence of the driver was not imputable in any way to the deceased. The question as to the alleged negligence of the deceased himself in not looking out for the approaching car or endeavoring to avoid injury to himself from the collision was submitted to the jury in an instruction as to which no complaint is made. Counsel does complain of the refusal to give a specific instruction on this subject, but the instruction given sufficiently covered the one asked. In another requested instruction the doctrine of the last fair chance was invoked, on the theory that the evidence tended to show that the driver saw the car approaching in time to have avoided the injury, notwithstanding the negligence of the motorman in

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failing to stop or check the speed of his car; but such doctrine has no application here, as negligence of the driver would not be the negligence of deceased. We find no error in the record with reference to the question as to the exercise of reasonable care on the part of the deceased to avoid the injury.

4. An instruction was refused in which the general rule was stated that the testimony of a witness in answer to hypothetical questions based upon the assumption of matters of fact is of no value whatever, if any one of the material facts assumed is not sustained by the evidence; but we think that there was no occasion under the record for the giving of such an instruction. The only expert whose testimony was allowed to go to the jury was a motorman who had previously been in the employ of defendant, and the hypothetical questions propounded to him related to the distance within which a car could have been stopped with certain appliances and under certain conditions. Counsel does not call our attention to any conflict in the evidence as to the appliances or conditions referred to in the questions, nor does he claim that there was a want of evidence as to such appliances or conditions. There was no occasion, therefore, to instruct the jury on this subject. Another witness, who had been at one time a motorman, was asked with reference to the distance within which a car could be stopped with the use of a different kind of controller than that in use on the car which collided with the hose wagon; but subsequently, on the request of counsel for plaintiff, who had introduced this witness, his testimony was stricken out, and in an instruction the jury were directed to disregard it. The circumstances attending the offer of this evidence, as appears from the record, were somewhat peculiar, and, if counsel for plaintiff had in fact got before the jury the opinion of this witness on a matter on which there was no other evidence, we might, perhaps, feel inclined to say that prejudice was not removed by the action of the court in striking it out and directing the jury to give it no consideration. But, as a matter of fact, after the witness had fixed a shorter distance than that fixed by the expert witness previously testifying as to the time within which the car might have been stopped, he changed his testimony so that it substantially accorded with that of the previous witness and furnished corroboration only, and not new or different testimony on that point. Under such circumstances we cannot think that there was any error resulting from the admission of the testimony of the witness which was not fully cured by the action of the court. Neither before nor after the testimony of this witness was stricken out was there any real conflict in the evidence on the subject. At least, counsel does not call attention to any such conflict, nor indicate in any way how prejudice could have resulted, and, in the absence of any suggestions that there could have been prejudice not removed by the action of the court, we are not called upon to interfere; for we must assume, in the absence of anything in the

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record to lead to a contrary conclusion, that the jury accepted and followed the direction of the court in the matter.

5. The refusal of the court to give an instruction to the effect that, in determining whether plaintiff's intestate was guilty of contributory negligence, the jury should not, under the facts and circumstances disclosed by the evidence, take into account or consideration the instinct of self-preservation, is complained of. But, as there is nothing in the record to indicate that the attention of the jury was in any way called to that doctrine, the refusal of the instruction was certainly not error. Plaintiff had not in any way suggested to the jury that there was any presumption that deceased was acting in accordance with such an instinct, and we are not to assume that the rule of law on the subject was known to the jury, or would be improperly applied by them at their own instance without their attention being called to it.

For the errors pointed out in the first division of this opinion, the judgment is reversed.

MINARD v. WEST JERSEY & S. RY. CO.

(Supreme Court of New Jersey, Nov. 19, 1906.)

[64 Atl. Rep. 1054.]

Evidence—Weight and Sufficiency—Circumstantial Evidence.*—In an action of tort to recover damages for the loss resulting to the plaintiff's property from a fire alleged to have been communicated by sparks from a locomotive engine, circumstantial evidence is, frequently, the only kind of proof obtainable; and, if the circumstances proven furnish ground for the jury to find that it was reasonably probable that the fire did thus originate, a verdict for the plaintiff will not be set aside.

Trial—Reception of Evidence—Rebuttal.—The admission of evidence in rebuttal, which might have been offered on the direct case, is within the discretion of the trial court.

Same—Argument of Counsel.—Unjustified comment by counsel upon witnesses in the cause should be restrained by the trial court, and may be, in the discretion of the court, required to be retracted. (Syllabus by the Court.)

Action by Charles Minard against the West Jersey & Seashore Railway Company. Verdict for plaintiff. Rule to show cause discharged.

Argued June term, 1906, before GARRETSON, PITNEY, and FORT, JJ.

*For the authorities in this series on the question whether a fire was set by a locomotive can be proved by circumstantial evidence, see foot-notes appended to *Swindell & Co. v. Alabama Midland Ry. Co.* (Ga.), 18 R. R. R. 519, 41 Am. & Eng. R. Cas., N. S., 519; *Toledo, etc., R. Co. v. Fenstermaker* (Ind.), 16 R. R. R. 855, 39 Am. & Eng. R. Cas., N. S., 855; *Gorham Mfg. Co. v. New York, etc., R. Co.* (R. I.), 16 R. R. R. 216, 39 Am. & Eng. R. Cas., N. S., 216; *Toledo, etc., R. Co. v. Parks* (Ind.), 15 R. R. R. 397, 38 Am. & Eng. R. Cas., N. S., 397.

*Minard v. West Jersey & S. Ry. Co**F. Morse Archer*, for plaintiff.*Gaskill & Gaskill*, for defendant.

FORT, J. There are a number of reasons alleged for a new trial under the rule allowed in this cause, but, upon the brief, only three of them are discussed. We will consider them in their order, as found in the brief.

First. Because the plaintiff failed to prove by direct and sufficient evidence the defendant's liability for the fire. The proof was circumstantial. A train passed shortly before the fire. The building caught fire on the roof. Two or three small fires, near to the building, were also set soon after the engine passed. The proof here was for the jury, and was sufficient, under *Wiley v. West Shore R. R. Co.*, 44 N. J. Law, 247, to send the case to them. The court rightly refused to nonsuit.

Second. Because the preponderance of the evidence was strongly with the defendant in several respects: (1) As to how the fire started. We do not think the proof on this point was with the defendant by the weight of the evidence. (2) As to the use of all practicable means to prevent the escape of sparks, the proof was not so free from doubt; but we think the justice left the effect and weight of the proof to the jury fully, and they have, by a special finding, answered four questions submitted by the court with unusual intelligence, as we think: "Ques. Was the fire communicated to the Minard building from engine No. 80? Ans. Yes. Ques. Was engine No. 80 on November 9, 1903, equipped with a spark arrester of approved pattern and in general use? Ans. Yes. Ques. Had the defendant caused an inspection of the spark arrester in No. 80 to be made within a reasonable time before November 9, 1903, in a reasonably careful manner? Ans. Yes, within a reasonable time, but not in a reasonably careful manner. Ques. Was the spark arrester of No. 80 on November 9, 1903, in as good order and condition as the taking and using of all practicable means would secure? Ans. No." They say they find the fire was communicated from the engine; that the engine was equipped with an improved spark arrester; that the defendant caused inspection, but that it was not done in a reasonably careful manner, and I think the proof of the man who inspected demonstrated that fact. And they find that the arrester was not in good order on the day of the fire. There was proof to justify the finding in the testimony of the Heaths, who testified to the size of the sparks that the locomotive emitted. True, it was objected that their evidence was wrongly admitted in rebuttal, but I think not. It was proper rebuttal, after the defendant had put the spark arrester in evidence, for the plaintiff to show that the sparks the Heaths saw could not have come through the mesh of the arrester in evidence if it were in good condition. In any event, the admission of the evidence in rebuttal was entirely within the discretion of the trial justice. *Foley v. Brunswick T. Co.*, 69 N. J.

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Law, 481, 55 Atl. 803. The evidence of Herr, who was offered to prove Inspector Bramford's inspection of this arrester, on November 12th, three days after the fire, by proving his handwriting, and then offering the paper containing Bramford's written report, was rightly rejected. Such a report is not evidence against the plaintiff.

The third and only remaining reason assigned for reversal is the following statement of counsel to the jury, which appears in the record in this way: "During the course of the argument to the jury, Mr. Archer said: 'Are you going to take the testimony of these railroad employees whose bread and butter is at stake?' Mr. Gaskill: 'I object. There is no proof in this case that the bread and butter of the railroad employees is at stake, nor is there any testimony from which any such inference can be drawn.' The court: 'I do not think the court can control counsel, even though the inferences that are drawn seem to the court not to be warranted. I do not think that is a matter of law at all.' Whereupon the defendant, by its counsel, prays a bill of exceptions, which is allowed and sealed accordingly." We incline to the view that the practice of counsel in making such comments should be frowned upon. He may rightly refer to the fact that certain witnesses are employees of the defendant, and that the jury should take that fact into account in considering their evidence. But, to practically declare, without any evidence to justify it, that if employees' witnesses do not testify falsely they will lose their positions, is objectionable. These witnesses were not impeached in any way. The court should have required counsel to withdraw the statement; there being no evidence in the cause to justify it. But we deem the refusal of the court, in this case, to be harmless error, and not sufficient to entitle the defendant to a new trial.

The remaining question is that the damages are excessive, but we cannot see how we can arrive at that result under the evidence. The rule of damages fixed by the court as "the fair market value of the machinery" is correct; not that which the defendant asked the court to charge, namely, that the plaintiff "can recover, if at all, only the value of old machinery as old machinery." Of course, its market value is its market value in the condition it was at the time of the fire.

The rule to show cause is discharged.

ATCHISON, T. & S. F. RY. CO. *v.* SPRAGUE *et al.*

(Supreme Court of Kansas, Nov. 10, 1906. Rehearing Denied Dec. 8, 1906.)

[87 Pac. Rep. 733.]

Railroads—Fires Set by Locomotives—Right of Way.*—In an action against a railway company for damages by fire, alleged to have been caused by a defective engine and negligence of the company in maintaining upon, and adjacent to, its right of way dry and combustible wooden sheds and wooden buildings with wooden roofs which took fire from the engine and communicated to and destroyed plaintiff's property, an instruction is erroneous which charges that it was the duty of defendant to keep its grounds and right of way free and clear from combustible materials and structures.

(Syllabus by the Court.)

Error from District Court, Lyon County; F. A. Meckel, Judge.

Action by E. F. Sprague and others against the Atchison, Topeka & Santa Fe Railway Company. Judgment for plaintiffs, and defendant brings error. Affirmed.

W. R. Smith, O. J. Wood, and A. A. Scott (A. A. Hurd, of counsel), for plaintiff in error.

W. A. Randolph, John G. Egan, and Buck & Spencer, for defendants in error.

PORTER, J. E. F. Sprague brought this action to recover damages for the destruction of a planing mill by fire, alleged to have been caused by sparks from a defective engine. It was claimed that the sparks ignited wooden coal sheds and other structures, owned or controlled by the railway company and located on its right of way, and from which the fire spread to the planing mill. A former judgment and verdict in favor of the railway company was reversed, and a new trial ordered on account of error in the instructions. *Sprague v. Railway Co.*, 70 Kan. 359, 78 Pac. 828. From a judgment and verdict in favor of plaintiff below, the railway company now brings error.

The petition set up the following, in addition to other acts of negligence: "Said defendant railway company, contrary to its duty in that regard, by itself and its agents and servants, carelessly and negligently failed to have and keep its grounds and right of way in said city free and clear from dry and combustible materials, and carelessly and negligently permitted dry and combustible wooden sheds and wooden buildings, with wooden roofs, to be and remain upon its said grounds and right of way, close to its railroad tracks, and where they were liable to and would be ignited by sparks and fire from its engines." The

*For the authorities in this series on the subject of the duty of a railroad company to keep its right of way clear of combustibles, see foot-notes appended to *Williams v. Atlantic Coast Line R. Co.* (N. Car.), 20 R. R. R. 522, 43 Am. & Eng. R. Cas., N. S., 522.

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court instructed the jury as follows: "I instruct you that it was the duty of the defendant railway company to keep its grounds, in close proximity to its tracks owned and held by it for use, in the operation of its road, free and clear from combustible material and structures in order that fires should not be set out and communicated by its engines. And, if you should find from the evidence that the defendant did not do so, but negligently permitted combustible material and structures to be and remain on its grounds in close proximity to its tracks, owned and held by it for use in the operation of its road, and that the same took fire from said engine No. 2319 of defendant, and that such fire spread to the plaintiff's property and caused the fire in question which plaintiff claims destroyed his property, and if you should also believe that the plaintiff was not guilty of contributory negligence, then your verdict should be for the plaintiff in such sum as the evidence shows he was damaged by reason of such fire." In another instruction the jury were told that it was the duty of the railway company to exercise "ordinary and reasonable care to keep its grounds adjacent to its tracks, owned and held by it for use in the operation of its road, free and clear from combustible material and structures." It is seriously urged that this same instruction, in substance, was approved in *Railway Co. v. Ludlum*, 63 Kan. 719, 66 Pac. 1045. The language of the instruction in that case was as follows: "'You are further instructed, that it was the duty of the defendant to keep its right of way free from dry grass, weeds, and other combustible material, in order that fires may not be set out on the right of way by passing engines and from there communicated to adjoining farms.'" The instruction was approved and was proper in that case. The claim was that the railway company permitted "dry grass, weeds, leaves, and vegetation" to remain upon the right of way, and that, by reason thereof, the fire was communicated to the property of plaintiff. The negligence relied upon and proved here was not in permitting weeds, dry grass, or rubbish to accumulate upon the right of way—something which ordinary prudence would suggest—which should be cleared off, and which by ordinary diligence could be removed, but the claim relied upon, and the evidence showed, that certain wooden buildings were permitted to stand upon the right of way; that these took fire and the fire communicated therefrom to plaintiff's property. There was no question in the case of negligence in permitting rubbish to accumulate. The things permitted to be upon the right of way were wooden buildings and structures. In effect the instructions stated the law to be that it is negligence per se for a railway company to permit combustible material and structures to be upon or in close proximity to its right of way. It is a matter of common observation that all wooden buildings, without reference to their age or condition, are combustible. It cannot be true that a railway company is required to construct its depots, warehouses, coal sheds and other structures of fire-proof

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material, or that it is guilty of negligence if it fails in this duty, or that it is negligence per se for a railway company to have upon its right of way buildings which are combustible. Is the error in these instructions cured by other instructions wherein the jury were told that defendant would be liable if it "negligently permitted" combustible materials and structures to be and remain upon its right of way? We think not. While the instructions are to be considered as a whole, the jury had been already told that it was the duty of the company to keep its right of way from combustible materials and structures, which was equivalent to an instruction that a violation of such duty was per se negligence.

It is insisted, however, that the error is cured by certain findings of the jury by which the negligence of defendant company is fixed irrespective of any negligence in reference to buildings. The findings upon which this claim is based are as follows: "No. 5. Q. Is it not a fact that switch engine No. 2319, on the day of the fire and preceding the fire complained of, was equipped with a reasonably good, safe, and approved system of apparatus for preventing the escape of fire and sparks? A. No. No. 6. Q. If you answer the fifth question in the negative, then please state in what respect said system of apparatus in use upon said engine was bad or defective. A. By defective netting. No. 7. Q. Is it not a fact that said switch engine No. 2319, upon the day of the fire, and previous to the fire, was in good condition, and that its apparatus for preventing the escape of fire and sparks was in good condition? A. No. No. 8. Q. If you answer the seventh question in the negative, then please state any defect that existed in said switch engine No. 2319 at the time of and immediately previous to the fire? A. Too coarse netting for switch engine. No. 21. Q. Did the fire originate from the improper construction of the engine or from the faulty condition or want of repairs of said engine No. 2319? A. Faulty condition of netting." Ordinarily where two or more specific acts of negligence are pleaded and relied upon, a finding to the effect that one act of negligence alone existed is sufficient to support a verdict for the plaintiff where the act of negligence found can be said to be the proximate cause of the injury. The findings and theory upon which the case was tried, however, make it apparent that the jury coupled two acts of negligence together as the proximate cause—the defective netting of the engine and maintaining combustible buildings on or near the right of way. This appears from their answer to question No. 13 where they were asked, in the event they should find that the fire was caused by the negligence of defendant, to state fully in what such negligence consisted. The answer was: "By defective sheds and engines." In answer to question No. 8, with respect to what defect they found in the engine, they answered: "Too coarse netting for a switch engine." There was evidence that a finer netting can be used on a switch engine than a road en-

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gine where greater speed is required. The care required of the company to keep its engines in proper condition, always depends, to some extent, upon the circumstances under which the engine is used. Switch engines as a rule are employed in and near railroad yards and not usually through fields where grass, weeds, and other combustible rubbish naturally accumulate. The jury may not have been willing to rest their verdict on the sole ground that the netting used in the switch engine was too coarse. In our opinion they considered the switch engine defective, in view of the highly combustible structures which they found the company negligently permitted to remain so near to its right of way, and the error in the instruction with reference to the duty imposed upon the company to keep the right of way clear from combustible structures was not cured by the separate finding that the netting was defective. It follows, therefore, that the judgment must be reversed and the cause remanded for another trial.

JOHNTON, C. J., GREENE, BURCH, MASON, and SMITH, JJ., concurring.

BALTIMORE & O. S. W. R. Co. v. SLAUGHTER.

(Supreme Court of Indiana, Nov. 13, 1906.)

[79 N. E. Rep. 186.]

Negligence—Licensee—Dangerous Premises—Assumed Risk.*—A bare licensee, who goes on the premises of another for some purpose with which the owner or occupant has no concern, and without the enticement, allurement, or inducement of the owner or occupant, assumes the perils arising from defects existing in the premises.

Railroads—Farm Crossings—Defects—Right to Cross.—Where defendant railroad company constructed and maintained a farm crossing, planking the space between the rails and building long approaches on either side, and plaintiff, a tenant of the adjoining owner, frequently used the crossing prior to his injury because of its obstruction by defendant, plaintiff, in using the crossing, was not a mere licensee, who assumed the risk of defects in the premises, though defendant's intent in constructing and maintaining the crossing was never communicated to any one, and plaintiff acted on the assumption that the crossing was designed for his use.

Same—Pleading.—Where, in an action for injuries to plaintiff by his team becoming frightened at an obstruction on a farm crossing maintained by defendant railroad company, the complaint charged that defendant carelessly and negligently placed a hand car lengthwise on the crossing, and carelessly and negligently obstructed the free use of the crossing by such hand car, and that the accident and injuries alleged were caused by and were the direct result of the neg-

*For the authorities in this series on the subject of the care due licensees and trespassers on railroad premises, see foot-note appended to *Atchison, etc., Ry. Co. v. Fuller* (Kan.), 20 R. R. R. 620, 43 Am. & Eng. R. Cas., N. S., 620; foot-notes appended to *Chattanooga So. R. Co. v. Wheeler* (Ga.), 19 R. R. R. 561, 42 Am. & Eng. R. Cas., N. S., 561; foot-notes appended to *Colorado & S. Ry. Co. v. Sonne* (Colo.), 18 R. R. R. 727, 41 Am. & Eng. R. Cas., N. S., 727.

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ligence charged, the complaint was not demurrable because it did not aver that the hand car and articles thereon were calculated to frighten teams of ordinary gentleness.

Pleading—Motion to Make More Definite.—Where a pleading is not sufficiently specific, the remedy is by motion and not by demurrer.

Negligence—Effect of Omission.—It is not necessary, in order to justify the submission of the question of negligence, that it should appear that the effect of the act or omission complained of would in all cases, or even ordinarily, be to produce the consequences which followed, it being sufficient if it was to be reasonably apprehended that such an injury might thereby occur to another while exercising his legal right in an ordinarily careful manner.

Railroads—Farm Crossing—Obstruction—Negligence.—Where plaintiff was injured by his team becoming frightened at a hand car placed on a farm crossing, whether the act of placing the car within the limits of the crossing was so calculated to frighten passing teams as to render it negligent to do such an act was a mixed question of law and fact which was presented by the issue formed on the allegation that the act was negligently done.

Same—Complaint.—Where, in an action for injuries to plaintiff by his team becoming frightened at a hand car left on a farm crossing, plaintiff was not guilty of contributory negligence in driving the mule that became frightened, and the complaint alleged that defendant's negligence in leaving the hand car on the crossing was the efficient cause of the accident, and that the mule that took fright was "well broken and not fractious or balky," the complaint was not objectionable for failure to aver that the mule was an animal of ordinary gentleness.

Same—Position of Obstruction.†—Where defendant railroad company constructed and maintained a farm crossing and its approaches, and defendant's servants left a hand car just outside the traveled way of the crossing by which plaintiff's team became frightened and ran away while plaintiff was using the crossing, causing the injuries complained of, the fact that the car was not within the traveled way of the crossing as alleged would not preclude a recovery, if the car was negligently left in such position and was calculated to frighten teams using the crossing of ordinary gentleness.

Same—Variance.—Where plaintiff alleged that a hand car by which his team became frightened was negligently left by defendant's employees on a farm crossing, and the proof disclosed that the car was not within the traveled way of the crossing, the variance was immaterial.

Appeal from Circuit Court, Clark County; H. C. Montgomery, Judge.

Action by William P. Slaughter against the Baltimore & Ohio Southwestern Railroad Company. From a judgment for plaintiff, defendant appeals. Transferred from the Appellate Court under Burns' Ann. St. 1901, § 1337u. Affirmed.

†For the authorities in this series on the subject of the duties and liabilities of railroad companies with respect to frightening teams, see foot-notes appended to *Alabama Great So. R. Co. v. Fulton* (Ala.), 20 R. R. R. 311, 43 Am. & Eng. R. Cas., N. S., 311; foot-notes appended to *Foster v. East Jordan Lumber Co.* (Mich.), 20 R. R. R. 282, 43 Am. & Eng. R. Cas., N. S., 282; foot-note appended to *Dulin v. Metropolitan St. Ry. Co.* (Kan.), 19 R. R. R. 844, 42 Am. & Eng. R. Cas., N. S., 844; *Southern Ry. Co. v. Norman* (Ind.), 19 R. R. R. 545, 42 Am. & Eng. R. Cas., N. S., 545; *Choctaw, etc., R. Co. v. Coker* (Ark.), 19 R. R. R. 159, 42 Am. & Eng. R. Cas., N. S., 159

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Chas. L. Jewett, for appellant.

L. A. Douglass and *H. W. Phipps*, for appellee.

GILLETTE, J. According to appellee's complaint, appellant carelessly and negligently left within the traveled way of a farm crossing, and as an obstruction to the free use of the same, a hand car, having upon it tools, tin dinner buckets, and clothing, and, as a result of the negligence charged, one of the animals, a mule, composing the team which appellee was driving along said way and across said track, became frightened at the hand car and ran away, throwing appellee out of his wagon and injuring him. Appellant, having been defeated in the trial court, prosecutes this appeal, and by its first assignment of error draws in question the propriety of the ruling of the court below in overruling a demurrer to the complaint.

It is contended by appellant's counsel that, so far as the complaint shows, appellee was a bare licensee, and that, having availed himself of the privilege of using the crossing, he was bound to accept it as he found it, or, in other words, that appellant could not properly be charged with negligence in having the car within the way. The allegations of the complaint concerning appellee's authority to use the crossing are as follows: "That said part of said railroad which runs through the said Clark county extends from the city of New Albany to the city of North Vernon, Ind.; that, at a point on said line of road, about five miles northeast of the said city of New Albany, Ind., and about 300 yards northeast of what is called and known as the "K. and L." cement mills, defendant had, before the said ——— day of November, 1903, constructed a private wagon road crossing of its said railroad track at said point, and which said crossing was then and there for the use and benefit of the owners of the adjoining lands on opposite sides of said railroad track at said point, and for their tenants and for all others who might have occasion to cross over and use the same in the use of the said lands aforesaid; that said crossing was on said day properly constructed by fastening planks eight feet wide to the ties in said track and filling in between them with broken stone, and defendant had also constructed approaches, being constructed of earth thrown up in the form of embankments and covered with broken stone, and the said approaches were about 30 feet in length and not to exceed 10 feet in width; that on said day plaintiff was a tenant of the person who owned the adjoining lands on either side of said track at said crossing, and had been for more than one year, and had on many occasions before said day used the said crossing in the prosecution of his said work as tenant; and that he cultivated the said adjoining lands as farming lands as such tenant, and on said day was entitled, as such tenant, to use the said crossing with wagons and teams in the prosecution of his said work; * * * that about 5 o'clock in the afternoon of said day the said plaintiff was lawfully driving a team consisting of one mule and one horse, attached to a two-horse wagon, from

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one portion of his said farm to another on the opposite side of said track of defendant, and, in so doing, had occasion to drive over and upon said crossing." In their statement of the contents of the complaint, appellant's counsel fully admit that it appears that appellee was a tenant of the adjacent farm, and that he went upon the crossing in the prosecution of his farm work. It is doubtless the rule that a bare licensee who goes upon the premises of another for some purpose with which the owner or occupant has no concern, and without any enticement, allurement, or inducement being held out to him by the owner or occupant, assumes the perils arising from defects existing in the premises. Within this class of cases are *Lingenfelter v. Baltimore, etc., R. Co.*, 154 Ind. 49, 55 N. E. 1021, and *Cannon v. Cleveland, etc., R. Co.*, 157 Ind. 683, 62 N. E. 8.

Putting aside all question as to the effect of the act of April 8, 1885 (section 5320 et seq., Burns' Ann. St. 1901), we are nevertheless of opinion that the facts charged do not make out a case in which appellee's entry upon the railroad was simply not opposed and prevented. While it is true that it does not appear that the intent of the company in respect to the construction and maintenance of the crossing was ever communicated to anyone, or that appellee acted upon the assumption that the crossing was designed for his use, yet, taking the subjective intent in respect to the purpose of its construction and maintenance, coupled with the fact that the planking of the space between the rails and the building of the long approaches on either side tended to show objectively what the intent was, and adding to this the frequent prior user of the way by appellee, we have a case wherein it appears to us that it would be contrary to good morals to permit appellant in effect to shift its ground, after the injury and after it had been haled into court, by asserting that appellee had ventured upon the crossing without invitation and at his own risk. Not to refine too much, it seems to us not unreasonable that the company should be subjected in the circumstances to the consequences of having extended an invitation which had been acted on. In *Indiana, etc., R. Co. v. Barnhart*, 115 Ind. 399, 16 N. E. 121, this court said: "When a person has a license to go upon the grounds or inclosure of another, he takes the premises as he finds them, and accepts whatever peril he incurs in the use of such license. But when the owner or occupant, by enticement, allurement, or inducement, whether express or implied, causes another to come upon his land, he then assumes the obligation of providing for the safety and protection of the person so coming, and for any breach of duty in that respect such owner or occupant becomes liable for any injury which may result to the person so caused to come onto his lands. The enticement, allurement, or inducement, as the case may be, must be the equivalent of an express or implied invitation. Mere acquiescence in the use of one's land by another is not sufficient. Such implied invitation may be inferred from

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some act or line of conduct, or from some designation or dedication. This general doctrine was affirmed in the case of *Railroad Co. v. Griffin*, 100 Ind. 221, 50 Am. Rep. 783, and it is well supported by a long line of authorities. *Sweeney v. Railroad Co.*, 10 Allen (Mass.) 368, 87 Am. Dec. 644; *Smith v. Docks Co.*, L. R. 3 C. P. 326; *Carleton v. Steel Co.*, 99 Mass. 216; *Railroad Co. v. Grush*, 67 Ill. 262, 16 Am. Rep. 618; *Doss v. Railway*, 21 Am. Rep. 371, 59 Mo. 27; *Elliott v. Pray*, 10 Allen (Mass.) 378, 87 Am. Dec. 653; *Stratton v. Staples*, 59 Me. 95; *Railroad Co. v. Hanning*, 15 Wall. (U. S.) 649, 21 L. Ed. 220; *Bennett v. Railroad Co.*, 102 U. S. 577, 26 L. Ed. 235; *Hayes v. Railway Co.*, 18 Reporter, 193. See *Lary v. Railway*, 78 Ind. 323, 41 Am. Rep. 572; *Railroad v. Bingham*, 29 Ohio St. 364; *Railway v. Goldsmith*, 47 Ind. 43; *Hargreaves v. Deacon*, 25 Mich. 1; *Sweeney v. Railroad*, 10 Allen (Mass.) 368, 87 Am. Dec. 644; *Nicholson v. Railroad Co.*, 41 N. Y. 525; *Durham v. Musselman*, 2 Blackf. 96, 18 Am. Dec. 133; *Hounsell v. Smyth*, 97 E. C. L. 731; *Gilles v. Railway Co.*, 59 Pa. 129, 98 Am. Dec. 317; *Southcote v. Stanley*, 1 Hurl. & N. 247; *Bolch v. Smith*, 7 Hurl. & N. 736; *Lygo v. Newbold*, 24 Eng. Law & Eq. 507; *Burdick v. Cheadle*, 26 Ohio St. 392, 20 Am. Rep. 767; *Hardcastle v. Railroad Co.*, 4 Hurl. & N. 67."

The case as pleaded contains some of the elements of a dedication, and, while we would not be understood as applying that doctrine to a private use, yet the consideration is not without value in determining whether it is just to hold that appellee occupied no higher plane of right, as respects negligence, than a mere trespasser. In *Bennett v. Louisville, etc., R. Co.*, 102 U. S. 577, 26 L. Ed. 235, we find the court observing that "the deceased, when injured, was using the premises for some of the very purposes for which they had been appropriated, and to which they had, so to speak, been dedicated by the owner." An essentially similar observation is to be found in *Indiana, etc., R. Co. v. Barnhart*, *supra*. But the word "invitation," to which the cases on the subject under consideration so often refer, includes, both in its lexicographical and its legal sense, not only an actual bidding, but also an allurement or enticement. While an invitation may not, at least in most circumstances, grow out of mere passivity as respects the condition of the premises, yet the cases abundantly justify the assertion that where an owner constructs a way over his premises in such a manner as apparently to be for the use of certain persons, with the intent that they should use it, and they continue to enjoy it for a considerable period of time, he owes to them a duty to exercise ordinary care for their safety while pursuing the privilege, so far as his own acts are concerned, and this is especially true as to a new and unapprehended danger. In *Corbey v. Hill*, 4 C. B. (N. S.) 562, the plaintiff was injured, while driving along a private road extending from a turnpike to a lunatic asylum, owing to the presence of a quantity of slate which the defendant had deposited

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upon the way. The latter attempted to justify under the permission of the owners of the soil. Cockburn, C. J., said: "The proprietors of the soil held out an allurement whereby the plaintiff was induced to come upon the place in question. They held out this road to all persons having occasion to proceed to the asylum as the means of access thereto. * * * Having, so to speak, dedicated the way to such of the general public as might have occasion to use it for that purpose, by having held it out as a safe and convenient mode of access to the establishment, without any reservation, it was not competent for them to place thereon any obstruction calculated to render the road unsafe and likely to cause injury to those persons to whom they held it out as a way along which they might safely go. If that be so, a third person could not acquire the right to do so under their license or permission." In the same case, Williams, J., said: "I see no reason why the plaintiff should not have a remedy against such a wrongdoer, just as much as if the obstruction had taken place upon a public road. Good sense and justice require that he should have a remedy and there is no authority against it." Willes, J., remarked: "The defendant has no right to set a trap for the plaintiff. One who goes upon another's land by the owner's permission or invitation has a right to expect that the owner will not dig a pit thereon, or permit another to dig a pit thereon, so that persons lawfully going there may receive injury." It is our conclusion that the facts pleaded show that appellee was more than a bare licensee, and that he was entitled to complain of the negligence charged.

Thus far we have dealt with a question, owing to the generality of the points made, which it was, perhaps, not the intention of counsel for appellants to raise. While they assert that appellee was a bare licensee to whom appellant was not liable for its negligence, yet their whole ground for this assertion, so far as anything definite in their brief is concerned, is based on the statement in *Bennett v. Railroad Co.*, 102 U. S. 577, 26 L. Ed. 235, to the effect that it is stated by Campbell, in his treatise on Negligence, that "the principle appears to be that invitation is inferred where there is a common necessity or a mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using it." But even in the *Bennett Case* the court states that no definite rule can be laid down, and the whole trend of the opinion is against the position of counsel. In the absence of further proof of the circumstances of the party's entry than that it was for his pleasure or benefit, there may be a presumption that he was a bare licensee, but the view is utterly wrong that this fact forms the basis of a controlling principle. In the leading case of *Sweeny v. Old Colony, etc., R. Co.*, 10 Allen (Mass.) 368, 87 Am. Dec. 644, the company was held liable for the negligence of its flagman, in signaling that the way was clear, at a crossing which belonged to the railroad, but which it had permitted the public to use for

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the purposes of travel. It was argued on behalf of the company that to hold it liable would involve the anomaly of charging it with a failure to guard a place which it was not bound to keep open, but Bigelow, C. J., said: "If a person undertakes to do an act or discharge a duty by which the conduct of others may properly be regulated and governed, he is bound to perform it in such a manner that those who are rightfully led to a course of conduct or action, on the faith that the act or duty will be duly and properly performed, shall not suffer loss or injury by reason of his negligence." And so we find it stated by Judge Cooley that, if one "expressly or by implication invites others to come upon his premises, whether for business or for any other purposes, it is his duty to be reasonably sure that he is not inviting them into danger, and to that end he must exercise ordinary care and prudence to render the premises reasonably safe for the visit." *Torts*, 605.

The next objection which appellant's counsel urge against the complaint is that it fails to aver that the hand car and articles thereon were calculated to frighten horses of ordinary gentleness. There is no doubt that this is an essential element in the case, but it does not follow that it must be specifically alleged. It is charged that the defendant carelessly and negligently placed said hand car lengthwise upon the crossing, and carelessly and negligently obstructed the free use of the same by said hand car, and also that the accident and injuries set forth were caused by, and the direct result of, the negligence charged. We are of opinion that it was not necessary to plead more specifically as to the nature of the defect. It is a general rule, both in this state and elsewhere, that, in complaints or declarations for negligence, it is competent, after showing the existence of a duty by appropriate allegations, to predicate negligence, charged in general terms, upon any act or omission whereby it is claimed that that duty was violated. If the pleading is not sufficiently specific, the remedy is by motion; it cannot be taken advantage of by demurrer. *Brookville, etc., Turnpike Co. v. Pumphrey*, 59 Ind. 78, 26 Am. Rep. 76; *Ohio, etc., R. Co. v. Collarn*, 73 Ind. 261, 38 Am. Rep. 134; *Louisville, etc., R. Co. v. Krimming*, 87 Ind. 351; *Cleveland, etc., R. Co. v. Wynant*, 100 Ind. 160; *Cincinnati, etc., R. Co. v. Gaines*, 104 Ind. 526, 4 N. E. 34, 5 N. E. 746, 54 Am. Rep. 344; *Town of Rushville v. Adams*, 107 Ind. 475, 8 N. E. 292; *Pittsburg, etc., R. Co. v. Kitley*, 118 Ind. 152, 20 N. E. 727; *Cleveland, etc., R. Co. v. Wynant*, 119 Ind. 539, 20 N. E. 730; *Rodgers v. Baltimore, etc., R. Co.*, 150 Ind. 397, 49 N. E. 453, and cases cited; *Lake Erie, etc., R. Co. v. McFall* (Ind. Sup.) 76 N. E. 400, and note to *King v. Oregon Short Line R. Co.*, as reported in 59 L. R. A. 209. It is not necessary, in order to justify the submission of the question of negligence to a trial, that it should appear that the effect of the act or omission complained of as negligent would, in all cases, or even ordinarily, be to produce the consequences which followed. It is sufficient to

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present a trial question if it was to be reasonably apprehended that such an injury might thereby occur to another while exercising his legal right in an ordinarily careful manner. Ohio, etc., *R. Co. v. Trowbridge*, 126 Ind. 391, 26 N. E. 64. It is not an uncommon thing, as the courts judicially know, for horses to be frightened at unusual objects. *Billman v. Indianapolis*, etc., *R. Co.*, 76 Ind. 166, 40 Am. Rep. 230; Wharton, *Negligence*, § 107. Whether the act of placing the hand car within the limits of a crossing was so calculated to frighten horses which might pass along the way as to render it negligent to do such an act was a mixed question of law and fact, and it was presented by the issue formed upon the allegation that the act was negligently done. In *Cleveland*, etc., *R. Co. v. Wynant*, 114 Ind. 525, 17 N. E. 118, 5 Am. St. Rep. 644, Mitchell, C. J., said: "All horses are disposed to scare or shy at objects of an unusual character in a highway. Roads are prepared with reference to this generally known disposition, and persons who place or leave objects in a highway are likewise charged with notice of this habit. There are things which every adult person of ordinary experience must be presumed to know. It is not, therefore, a subject to be pleaded and proved—whether a box car, or any other particular object, is naturally calculated to frighten horses. This is to be determined by the experience, observation, and intelligence of the court and jury as applied to all the facts of the particular case before them." But, without further discussion of the objection stated, we content ourselves with the statement that in several cases this court has treated as unnecessary the averment that the object complained of was calculated to frighten horses of ordinary gentleness. *Brookville*, etc., *Turnpike Co. v. Pumphrey*, *supra*; *Cincinnati*, etc., *R. Co. v. Gaines*, *supra*; *Town of Rushville v. Adams*, *supra*; *Pittsburgh*, etc., *R. Co. v. Kitley*, *supra*; *Rodgers v. Baltimore*, etc., *R. Co.*, *supra*.

The further objection is made to the complaint that it fails to aver that appellee's mule was an animal of ordinary gentleness. The allegation which the complaint contains is that the mule was "well broken and not fractious or balky." If this be not an equivalent allegation, we are nevertheless of opinion that the general charges in respect to negligence rendered the complaint good on demurrer. Conceding, as we do, that there is no liability where the object which occasioned the mischief was not naturally calculated to frighten horses of ordinary gentleness, yet it by no means follows that the owner of a high-spirited horse is remediless for an injury occasioned by its running away, owing to its being frightened by an object naturally calculated to frighten horses of ordinary docility. In view of the statute, we cannot assume that appellee was guilty of contributory negligence in driving the animal in question, and that this element subtracted from the case as presented by the complaint, appellee appears to be entitled to recover on the facts admitted by the demurrer, as it is averred in the complaint that appellant was

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negligent in the particulars stated and that such negligence was the cause of and directly resulted in, the accident and injury. If, without the contributory fault of the driver, a horse runs away, and the negligent act of another is so far an efficient cause that, but for such negligence, the horse would not have run away, it would seem, on general principles that the latter would be liable for an injury thereby caused to the driver. *Grimes v. Louisville, etc., R. Co.*, 3 Ind. App. 573, 30 N. E. 200, and cases cited. This state of facts seems, in legal effect, to be shown by the complaint before us when it is subjected to the rules of construction which govern complaints in negligence cases. It was assumed in *Town of Rushville v. Adams*, 107 Ind. 475, 8 N. E. 292, not only that it is required that the object or obstruction should be one calculated to frighten horses of ordinary gentleness, but also that the particular horse should be of that character. In answer, however, to the objection that these facts did not appear from the complaint, the court in that case said: "The general averment in the complaint before us—that the injury was not caused by any negligence or carelessness on the part of the plaintiff, but was caused wholly by the negligence of the town in permitting the person to maintain and carry on the business of making candy in the street—we think, makes the complaint good as against the demurrer for want of facts." Bearing in mind the effect of the contributory negligence statute since passed, the case from which we have just quoted appears to be an opposite precedent in support of the view—whether the character of the particular animal be an element or not—that the general charge of negligence, coupled with the averment that the injury was thereby caused, sufficiently shows that the legal rights of the complaining party have been invaded. See, also, *Keeley Brewing Co. v. Parnin*, 13 Ind. App. 588, 41 N. E. 471. We hold that the complaint is sufficient.

Under an assignment of error based on the overruling of a motion for a new trial, appellant's counsel argue that, in a number of particulars, the evidence fails to sustain the verdict. We have read the testimony, as set out in the bill of exceptions, and are of opinion that it cannot be said that there is an entire lack of evidence in support of any proposition which appellee was called on to maintain under the issues. The point which counsel for appellant place most stress upon under the assignment in question is that the testimony shows that the hand car was at one side of, and not in, the way, and it is claimed that, for this reason, the evidence failed to maintain the theory of the complaint. There seems to be some confusion in the testimony between the way, as it was graded up, and the ordinary or traveled track. There is some testimony that the hand car was within the way. But, if it can be said that the evidence shows that the hand car was outside of, although very near, the way, yet it does not follow that appellant was not entitled to recover. Where an object calculated to frighten horses is placed near, but not

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in, a public highway, there would be a question as to the liability of the city therefor, owing to the fact that the municipality did not have control over the place where the object was located. We can perceive no reason, however, for the holding that where the title to a way and the adjoining lands is in the same person there is no liability. Even in the case of a conveyance of a way of a fixed width, it would be to permit the holder of the servient estate to derogate from his own grant to uphold him in his act of placing an object calculated to frighten horses so near the way as to impair the value of the use. The placing of the hand car where it was, if the act was really calculated to produce the mischief complained of, impinged upon the rights of appellee, although perhaps in a lesser degree than would have been the case had there been a physical obstruction of the way. Even in the case of a public road, a municipality may be liable for placing an obstruction calculated to frighten horses within the margin thereof. *Foshay v. Town of Glen Haven*, 25 Wis. 288, 3 Am. Rep. 73; *Morse v. Town of Richmond*, 41 Vt. 435, 98 Am. Dec. 600. As indicated in the latter case, the right to control the whole width of the road gives rise to a corresponding duty. There are perils attending the use of farm crossings which are concomitants of the use, such as the dangers occasioned by the passing of trains and the like, but the act in question caused a wholly unnecessary peril, and one which was in no wise inherent in the use, and it was the invasion of appellee's right in this particular which really constituted the gist of his action. If it can be said that evidence that the hand car was placed on the margin of the way does not substantially prove the allegation as laid, yet at most there was but a technical variance which it is our duty to treat as if the defect had been obviated by amendment. *Farley v. Eller*, 29 Ind. 322; *Reddick v. Keesling*, 129 Ind. 128, 28 N. E. 316; *Latshaw v. State, ex rel.*, 156 Ind. 194, 59 N. E. 471; *Hartwell Bros. v. Peck & Co.*, 163 Ind. 357, 71 N. E. 958; *M. S. Huev Co. v. Johnson*, 164 Ind. 489, 73 N. E. 996. This was the holding in *Bristol Hydraulic Co. v. Boyer*, 67 Ind. 236, where the supposed variance was of the same character as it is contended existed in this case. We find no error.

Judgment affirmed.

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(Supreme Court of Missouri, Division No. 2, May 22, 1906. Rehearing Denied Nov. 20, 1906.)

[97 S. W. Rep. 880.]

Trial—Instructions—Application to Facts and Evidence—Railroads—Crossing Accident.—Where, in an action for death of a traveler at a railroad crossing, the condition of the crossing was not shown to have had anything to do with the collision, and the passage of decedent's wagon over the crossing was not impeded, an in-

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struction calling attention to the dangerous character of the crossing and charging that if it was of such a character as to enhance the danger of accidents at the crossing it was the duty of defendant's servants, in running trains, to exercise care commensurate with the danger reasonably to be apprehended, was erroneous.

Railroads—Defective Crossing—Proximate Cause of Death.—That a railroad crossing at which decedent was killed might have been of such a character as to enhance the danger of collisions did not constitute sufficient negligence on the part of the railroad company to entitle plaintiff to recover, in the absence of proof that the condition of the crossing directly caused or contributed to decedent's death.

Trial—Conflicting Instructions.—In an action for death at a railroad crossing, the court charged that the "only" duty of the engineer on approaching the crossing, so far as its condition was concerned, was to sound his whistle and to ring the bell, that if such duties were discharged, the jury could not find a verdict for plaintiff on specifications of negligence with reference to the condition of the crossing and the sounding of the whistle or bell, and also charged that the operatives of the train, in passing over the crossing, were bound, in addition, to exercise a degree of care commensurate with the danger of collision reasonably to be apprehended at that location, and if they failed to do so, and in consequence thereof decedent received the injuries from which he died, the jury should find for plaintiff. Held, that such instructions were in irreconcilable conflict.

Railroads—Crossing Accident—Signals—Duty to Look and Listen.*—Failure of a traveler approaching a railroad crossing to look both ways and listen for trains is not excused by the negligence of the railroad company in failing to give proper signals.

Same—Presumption of Care.†—Where decedent was killed in a collision at a railroad crossing, he would be presumed, in the absence of any evidence in plaintiff's behalf as to decedent's acts of care, to have looked and listened, and to have exercised ordinary care to avoid collision with defendant's trains while he was attempting to cross the track.

Same.‡—The presumption that a person, killed in a collision at a railroad crossing, exercised ordinary care is overcome by the conclusion derived from the evidence that had he listened he could have

*For the authorities in this series on the subject of the combined effect of contributory negligence of the highway traveler and failure to give crossing signals, see foot-notes appended to *Dougherty v. Chicago, etc., Ry. Co.* (S. Dak.), 20 R. R. R. 288, 43 Am. & Eng. R. Cas., N. S., 288; foot-notes appended to *Cooper v. North Carolina R. Co.* (N. Car.), 19 R. R. R. 857, 42 Am. & Eng. R. Cas., N. S., 857; *Green v. Missouri Pac. Ry. Co.* (Mo.), 18 R. R. R. 793, 41 Am. & Eng. R. Cas., N. S., 793; *Brammer's Adm'r v. Norfolk & W. Ry. Co.* (Va.), 18 R. R. R. 497, 41 Am. & Eng. R. Cas., N. S., 497.

†For the authorities in this series on the subject of the presumption of the exercise of due care by a person killed by a train or car, see *Hanna v. Philadelphia & R. Ry. Co.* (Pa.), 19 R. R. R. 819, 42 Am. & Eng. R. Cas., N. S., 819; foot-notes appended to *Carlson v. Chicago & N. W. Ry. Co.* (Minn.), 19 R. R. R. 208, 42 Am. & Eng. R. Cas., N. S., 208; foot-notes appended to *Rietveld v. Wabash R. Co.* (Iowa), 19 R. R. R. 181, 42 Am. & Eng. R. Cas., N. S., 181; *Ryan v. St. Louis Transit Co.* (Mo.), 18 R. R. R. 775, 41 Am. & Eng. R. Cas., N. S., 775; *Gorham v. Milford, etc., Ry. Co.* (Mass.), 18 R. R. R. 745, 41 Am. & Eng. R. Cas., N. S., 745; *Looney v. Metropolitan R. Co.* (U. S.), 18 R. R. R. 617, 41 Am. & Eng. R. Cas., N. S., 617; *Donaldson v. New York, etc., R. Co.* (Mass.), 18 R. R. R. 424, 41 Am. & Eng. R. Cas., N. S., 424.

‡For the authorities in this series on the subject of the sufficiency of evidence to rebut the presumption of due care on the part of a per-

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heard the train and had he looked he could have seen it in time to have avoided the collision.

Same—Contributory Negligence.‡—Where decedent, when approaching a railroad crossing at which he was killed, looked around before going on the track and saw the train, but nevertheless drove directly on the crossing, and urged his horses over the same, he was guilty of contributory negligence as a matter of law.

Same—Discovered Peril.§—Decedent was seen approaching a railroad crossing by defendant's fireman, who communicated the fact to the engineer, and the latter immediately shut off the steam, and blew the whistle. The fireman, on seeing decedent urge his horses forward, told the engineer he believed decedent was going to cross the track ahead of the engine, whereupon the engineer put on the air, but too late to avoid the collision. Held, that the operatives of the train were entitled to presume that decedent would not attempt to cross ahead of the engine, and were therefore not chargeable with negligence in failing to take proper steps to prevent a collision after discovering decedent's peril.

Appeal from Circuit Court, Lafayette County; Samuel Davis, Judge.

Action by Lydia J. Porter against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed.

Martin L. Clardy and *W. W. Graves*, for appellant.

John M. Redmond and *Wm. Aull*, for respondent.

BURGESS, P. J. This is an action by plaintiff, the widow of E. B. Porter, deceased, against the defendant company, to recover the sum of \$5,000 damages, under the provisions of section 2864, Revised Statutes, 1899, known as the "second section of the damage act." The petition upon which the case was tried was the second amended petition, in two counts, but as the recovery was upon the first count, the second count will not be further noticed.

Said first count alleges "that the death of the said E. B. Porter was due to the gross, wanton, and willful negligence of the defendant and its agents and employees, its engineer and fireman in charge of said train, as follows: (1) That the defendant, through its agents and employees, had knowledge of the dangerous conditions about, on, and surrounding said crossing and approach to the same, hereinbefore stated, at the place where

son killed by a train or car, see foot-notes appended to *Carlson v. Chicago & N. W. Ry. Co.* (Minn.), 19 R. R. R. 208, 42 Am. & Eng. R. Cas., N. S., 208.

§For the authorities in this series on the subject of the right of those in charge of trains or cars to assume that persons seen on or near track will avoid danger, see foot-notes appended to *Garvick v. United Rys. & Elec. Co.* (Md.), 20 R. R. R. 615, 43 Am. & Eng. R. Cas., N. S., 615; foot-notes appended to *Kelly v. Ohio River R. Co.* (W. Va.), 19 R. R. R. 807, 42 Am. & Eng. R. Cas., N. S., 807; *Copp. v. Maine Cent. R. Co.* (Me.), 19 R. R. R. 199, 42 Am. & Eng. R. Cas., N. S., 199; foot-notes appended to *Louisville, etc., R. Co. v. Hathaway's Ex'x* (Ky.), 18 R. R. R. 749, 41 Am. & Eng. R. Cas., N. S., 749; *Louisville & N. R. Co. v. Redmon's Adm'x* (Ky.), 18 R. R. R. 737, 41 Am. & Eng. R. Cas., N. S., 737.

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the said E. B. Porter was killed, and that said crossing, on account of the conditions prevailing, was dangerous, and that a team and driver were liable to be caught on the said crossing on account of said prevailing conditions; and in failing to have its train slowed down and under control approaching said crossing, and in running the same up to said crossing at a high rate of speed. (2) In failing to sound the whistle or ring the bell of said engine as the said engine approached said crossing 80 rods before reaching said crossing, and in failing to continue to sound said whistle at intervals or to keep the bell ringing until said crossing was passed, as provided by law. (3) In sounding the locomotive whistle continuously on the immediate approach of said crossing, thereby frightening the team of horses driven by the decedent E. B. Porter, and preventing them from crossing to a point of safety. (4) In the failure of the defendant through its agents and employees to observe the perilous position of the decedent E. B. Porter with the team of horses on the crossing at which he was killed, in time to have stopped the train or to have prevented the collision and its results as herein described. (5) In the failure of the defendant and its employees, the engineer and fireman in charge of said train, to stop the same, or make an effort to do so, after discovering the peril of E. B. Porter, decedent, with the team on the crossing or to avert the collision with the said decedent and the said team. That by reason of the killing of the said E. B. Porter the plaintiff has been damaged in the sum of \$5,000, no part of which has been paid or satisfied in any way. Wherefore, plaintiff asks judgment against the defendant for the sum of \$5,000 and for her costs." By answer, defendant denied all the allegations in both counts, and pleaded contributory negligence on the part of the deceased. Plaintiff replied, denying all new matter in said answer contained. Upon a trial before the court and jury, plaintiff recovered a verdict upon said first count of the petition for \$5,000 upon which judgment was rendered. Within four days after verdict, the defendant filed motion for new trial, which was overruled, and defendant appealed.

The material facts, as disclosed by the record, are substantially as follows: The deceased was killed by one of defendant's passenger trains about 6 o'clock on the evening of March 6, 1902, while attempting to cross the track of said railway while on his way with a wagon and team from Lexington to Wellington in Lafayette county. It was open daylight at the time of the accident. The only witnesses as to the accident were the fireman and engineer of the train, which was running at the time at a speed of about 30 miles an hour. The train was west bound from Lexington to Wellington, and on time when it left Lexington, about 5 or 6 miles east of the place of the accident. At the time of the accident deceased was sitting in a common farm wagon drawn by two horses. He had been engaged for some time in hauling flour from Wellington to Lexington for a milling

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company, and was familiar with this railway crossing, its situation and surroundings. The usual warning signal of danger was in plain view at the crossing. Back from the scene of the accident for at least a quarter of a mile northeastward, which was the direction from which deceased was traveling, and the direction from which the train that struck him approached, the county road and the railway ran practically parallel, and for the greater part of the way the county road was in proximity to the right of way. The elevation of the track was three or four feet above the county road, and the evidence showed that a person traveling westward toward the crossing where the accident occurred could, on crossing the county bridge over the Little Sni, 120 feet from the railway crossing, see a train half a mile down the track, but that he loses sight of it as it approaches on account of timber until the train gets within 100 feet of the bridge across Cow creek, which bridge across Cow creek is about 700 feet from the place of the accident; that a traveler in a wagon, when arrived at the crossing, could see up the track 600 or 700 feet.

There was at the time of the accident, and for several months or a year prior thereto, a hole, two or three feet deep, between the right of way fence and the crossing, so that a kind of temporary wagon way had been formed by teams passing around the hole. Plaintiff introduced evidence showing and explaining the elevation of the bridges, the railroad and wagon road, the curve of the railroad approaching the point where the accident occurred; the trees, vines and underbrush bordering the railroad track and wagon road; also as to the vision of the approaching train from the wagon bridge over the Little Sni, and from the crossing. The evidence upon the part of the defendant showed affirmatively that the whistle on the train was sounded near the whistling post, 1320 feet northeast of the crossing, and that the whistle was sounded a number of times again as soon as the deceased was discovered approaching the crossing. Plaintiff introduced a number of witnesses, some of whom were passengers on the train at the time, who testified that they did not hear the bell ring or the whistle sound.

The court, at the instance of the plaintiff, instructed the jury, with respect to the first allegation of negligence in the petition, as follows: "The jury are instructed that if they believe from the evidence that the crossing in controversy was of such a character as to enhance the danger of collision and accidents at said crossing that it was the duty of the servants, agents, and employees of defendant in managing or running said locomotive and train of cars to exercise a degree of care in the operation of said train commensurate with the danger of collision reasonably to be apprehended at that location. And if the jury further believe from the evidence that the agents, servants, and employees of defendant failed to exercise such commensurate degree of care in the movement of such locomotive and train of cars as it

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approached and passed over said crossing, either by not keeping the bell on such locomotive ringing from a point 80 rods before said train reached said crossing or sounding the whistle on said locomotive at said point 80 rods before reaching said crossing and continuing to sound the same at intervals until said locomotive passed said crossing, such failure in any of said particulars constituted negligence on the part of said defendant. And in passing on the question as to whether the agents, servants, and employees of the defendant were or were not negligent in running or managing said locomotive and train in any of the particulars aforesaid, you should take into consideration all of the facts and circumstances which you may find from the evidence existed at the time when and at the place where the injury occurred. And if you further believe from the evidence that in consequence of such negligence in any one or more of the respects hereinbefore mentioned the said E. B. Porter received the injuries from which he died, you will find your verdict for the plaintiff, unless you further believe from the evidence that the deceased was guilty of negligence which directly contributed to his death. And the burden of proving contributory negligence on the part of E. B. Porter rests on the defendant, and unless the defendant has proven such contributory negligence by a preponderance of the evidence, or unless said contributory negligence is shown by plaintiff's evidence, you cannot find for the defendant on that ground."

This instruction is erroneous and vicious. Its first sentence directs the attention of the jury to the dangerous condition of the crossing, and tells them that if the crossing was of such a character as to enhance the danger of collisions and accidents at such crossing, it was the duty of the servants, agents, and employees of defendant, in managing or running said locomotive and train of cars, to exercise a degree of care commensurate with the danger of collision reasonably to be apprehended at that location, when in fact the evidence does not show that the existence of the hole or condition of the crossing had anything whatever to do with the collision. The wagon was not loaded, and its passage over the crossing was not impeded, though it might have been slightly delayed by reason of the necessity of driving around the hole. In order to have entitled plaintiff to recover on account of the condition of the crossing, it devolved upon her to show that its condition directly caused or contributed to the death of her husband, which the evidence in no way shows. There was, therefore, nothing upon which to bottom this part of the instruction, and the mere fact that the crossing might have been of such a character as to enhance the danger of collisions and accidents is not a sufficient ground of negligence to entitle plaintiff in this case to recover. Besides, this instruction as a whole is in direct conflict with defendant's instruction No. 4, which is as follows: "As to said first alleged act of negligence under the first count of plaintiff's petition, the court instructs the

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jury that although they may believe from the evidence that the crossing on which plaintiff's husband was struck was dangerous for the crossing of teams by reason of the near location of the wagon road and the railroad to each other and the nearness of the wagon road and the railroad bridges across a stream known as 'Little Sni,' near said crossing, and that the approach thereto was steep and over loose stones, and by reason of a sharp curve in the railroad approaching said bridge from the east and by reason of such railroad running through weeds, vines, underbrush, and trees, and that the defendant, through its employees, knew such surroundings near said crossing, yet, in approaching said crossing, it was not the duty of the defendant's employees running the engine and train which struck the plaintiff's husband, to slow down the speed of its train, nor to avoid approaching said crossing at the usual and ordinary rate of speed. The only duty of said engineer, on approaching said crossing, so far as the character and condition of said crossing is concerned, was to sound the whistle of his engine at least 80 rods before his engine reached said crossing, and to ring the bell thereof from the time said whistle was sounded until his engine passed over said crossing. In other words, such engineer owed no other or greater duty to the public under the law when approaching the crossing in question than he owed when approaching any other crossing over the railroad track, and if the jury believe that the engineer in charge of the engine which struck the plaintiff's husband sounded the whistle of his engine at least 80 rods before his engine reached said crossing, and rang the bell thereof from the time said whistle was sounded until his engine passed over said crossing, then the jury cannot find a verdict in plaintiff's favor on the first or second alleged acts of negligence in the first count of plaintiff's petition."

It will be observed that, by this instruction, the jury were told that the only duty of the engineer, on approaching said crossing, so far as the character and condition of said crossing was concerned, was to sound the whistle of his engine at least 80 rods before the engine reached said crossing, and to ring the bell thereof from the time said whistle was sounded until his engine passed over said crossing, and that, in effect, if the jury believed the engineer discharged these duties they could not find a verdict in plaintiff's favor on the first or second alleged acts of negligence in the first count of the petition; while, by plaintiff's instruction aforesaid, there was imposed upon those in charge of the train the further and additional duty of exercising a degree of care in the operation of such train commensurate with the danger of collision reasonably to be apprehended at that location, and that if they failed to do so, and in consequence thereof the said E. B. Porter received the injuries from which he died, the jury should find for the plaintiff. The two instructions are clearly in conflict and irreconcilable. The most that can be said for plaintiff with respect to the alleged failure of those in charge of

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the train to sound the whistle and ring the bell, when approaching the crossing, is that the evidence is somewhat conflicting, and that as the question was properly submitted to the jury and they found that those in charge of the train failed to ring the bell or sound the whistle as required by law, this court should not, therefore, interfere with the verdict. But conceding that question to be settled in plaintiff's favor; that is, that defendant's servants in charge of the train were guilty of negligence because of failure to sound the whistle at least 80 rods before the engine reached the crossing and to keep the bell ringing until said crossing was passed, as provided by law—that would not entitle plaintiff to recover, provided the deceased was guilty of negligence contributive to his death. There is no pretence that he either looked or listened when about to cross the track, when, by listening, he could have heard, and by looking, he could have seen, the approaching train in time to have avoided the injury. In doing so, he would simply be exercising that ordinary care which the law requires of all adult persons when about to cross a railroad track at a public crossing, and if a person in crossing such track is injured by reason of the concurrent fault of himself and the railroad company he cannot recover. *Jones v. Barnard*, 63 Mo. App. 501.

It is well settled in this state that, when a traveler approaches a railroad crossing, he must look both ways and listen for coming trains, and the negligence of the company in failing to give proper signals will not excuse the traveler's duty to look and listen. *Fletcher v. Railroad*, 64 Mo. 484; *Zimmerman v. Railroad*, 71 Mo. 476; *Baker v. K. C., Ft. Scott & M. Ry. Co.*, 122 Mo. 533, 26 S. W. 20; *Purl v. Railroad*, 72 Mo. 168; *Donohue v. Railroad*, 91 Mo. 357, 2 S. W. 424, 3 S. W. 848; *Butts v. Railroad*, 98 Mo. 272, 11 S. W. 754; *Schmidt v. Railroad* (Mo. Sup.) 90 S. W. 136, 3 L. R. A. (N. S.) 196. In response to this well-settled rule plaintiff contends that, in the absence of any evidence on plaintiff's behalf as to acts of care on the part of deceased, he is presumed to have looked and listened, and to have exercised ordinary care to avoid possible collision with defendant's trains while he was attempting to cross the track. This may be conceded to be well-settled law, as the authorities cited by counsel for plaintiff abundantly show; but this presumption is overcome by the logical and irresistible conclusion that deceased, had he listened, could have heard the train, and, had he looked, he must have seen it in time to have avoided the collision, and, having failed to take such precautions, he was guilty of negligence as a matter of law. *Schmidt v. Railroad*, supra. Besides, the uncontradicted evidence of the fireman on the engine was that the deceased did, in fact, look around before entering upon the track, and that he saw the train, but that Porter "drove directly on the crossing—he urged his horses right over the crossing of the track," which affirmatively shows negligence on the part of the deceased.

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There remains for consideration but one other question, which is as to whether defendant's employees in charge of the train could have discovered the perilous situation of Porter, or did so discover it, in time to have prevented the collision, and did not take proper and necessary steps to prevent it. To determine this question we must look to the testimony of the fireman on the train, the only witness who was in a position to see the whole occurrence. He testified as follows: "Q. As you ran up toward the trestle work across Cow creek and Sni Crossing, state to the jury if you saw at any time Mr. Porter, or the man that was struck, on the country road, and, if so, where you first saw him, and where the engine was. A. Well, of course, you understand there is a curve in the track. You have to go around the bulk of the curve before you can see. The bridge, of course, on the left-hand side, as you go around the curve. I saw the team approaching the bridge. Now, they kept going right along, and I watched them, and when they got a little closer around the team started up in a trot, and I says to the engineer. 'There is a team on the bridge.' I says, 'There is a man on the bridge.' Q. What did he do, if you remember? A. Shut off his steam, and blowed the whistle. Q. Did you say anything else to him? A. I said, 'I believe he is going to cross ahead of us.' During this time this man looked around and saw the engine. Q. What did he do then? A. He urged his horses ahead. Q. What did the engineer do, if anything, when you told him you believed he was going to cross the track? A. The engineer put on his air. Q. Do you know what is meant by the emergency stop? A. Yes, sir. Q. Well, how did he put on his air then? A. He set his air. I couldn't say just how. Q. What happened after that? How did the man in the wagon proceed? Tell it just as you saw it. Just tell as you saw it there, and if the man drove directly on the crossing. A. Why, the man drove directly on the crossing. He urged his horses right over the crossing of the track. Q. Now, state to the jury—it struck on the crossing right there, did it? A. Yes, sir. Q. At the Little Sni Crossing? A. Yes, sir. Q. From the time you saw that man as he was approaching from the county bridge until he went up on the crossing and was struck, was he out of your sight? A. No, sir; he was not."

Those in charge of the engine had the right to presume that Porter would not leave a place of safety, and enter a place of danger, and were not negligent in stopping the train sooner, as the evidence clearly shows that they did everything in their power to stop or check up the train after they discovered the perilous position of the deceased. There is no evidence showing or tending to show that those in charge of the train were derelict in this regard. It is manifest, from the evidence, that the deceased could not have failed to see the approaching train, and that in fact he did see it, but that he nevertheless urged his team over the crossing. And although "the defendant may have been negligent in failing to give signals for the crossing. * * *

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yet the deceased having lost his life through his own negligence in failing to discharge the duty imposed upon him by law, in his situation, the plaintiff cannot recover for his death." *Hayden v. M., K. & T. Ry. Co.*, 124 Mo. 566, 28 S. W. 74. Our conclusion is that the court should have given the instruction in the nature of a demurrer to the evidence, at the close of all the evidence, as asked by defendant.

The judgment is reversed. All concur.

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(Court of Errors and Appeals of New Jersey, Nov. 19, 1906.)

[64 Atl. Rep. 1059.]

Street Railroads—Collision with Team—Question for Jury.*—When the driver of a vehicle approaches, with intent to cross, a trolley track on which a car is running in his direction, and if, from the distance of the car, and assuming that it is furnished with brakes and a man to apply them, he may reasonably determine that he has acquired a right to cross first, it is a question for the jury whether the facts justifying that determination are established by the evidence, and whether the driver, in proceeding to cross, exercised a reasonable judgment.

Same.†—If the driver, just before going upon the track, checks his

*For the authorities in this series on the subject of the mutual rights and duties of street railways and other users of streets, see foot-notes appended to *Halloran v. Worcester Consol. St. Ry. Co.* (Mass.), 20 R. R. R. 582, 43 Am. & Eng. R. Cas., N. S., 582.

For the authorities in this series on the question whether there can be a recovery for injuries sustained in attempting to cross a railroad track in front of an approaching train or car which is seen by the party injured to be approaching before he makes the attempt, see foot-notes appended to *Colomb v. Portland & B. St. Ry.* (Me.), 20 R. R. R. 293, 43 Am. & Eng. R. Cas., N. S., 293.

†For the authorities in this series on the subject of the care required of those driving other vehicles in streets upon which street cars are operated, see foot-notes appended to *Indianapolis St. Ry. Co. v. Marschke* (Ind.), 20 R. R. R. 609, 43 Am. & Eng. R. Cas., N. S., 609; foot-notes appended to *Timler v. Philadelphia Rapid Transit Co.* (Pa.), 20 R. R. R. 500, 43 Am. & Eng. R. Cas., N. S., 500; *Latson v. St. Louis Transit Co.* (Mo.), 19 R. R. R. 845, 42 Am. & Eng. R. Cas., N. S., 845; foot-notes appended to *Strode v. St. Louis Transit Co.* (Mo.), 19 R. R. R. 569, 42 Am. & Eng. R. Cas., N. S., 569; *Foulk v. Wilmington City Ry. Co.* (Del. Sup'r Ct.), 19 R. R. R. 541, 42 Am. & Eng. R. Cas., N. S., 541; *Logan v. Old Colony St. Ry. Co.* (Mass.), 19 R. R. R. 141, 42 Am. & Eng. R. Cas., N. S., 141.

For the authorities in this series on the subject of the care required of those in charge of street cars to avoid collisions with other users of streets, see foot-notes appended to *Jacksonville Elec. Co. v. Adams* (Fla.), 20 R. R. R. 295, 43 Am. & Eng. R. Cas., N. S., 295; foot-notes appended to *Latson v. St. Louis Transit Co.* (Mo.), 19 R. R. R. 845, 42 Am. & Eng. R. Cas., N. S., 845; foot-notes appended to *Boudwin v. Wilmington City Ry. Co.* (Del. Sup'r Ct.), 19 R. R. R. 564, 42 Am. & Eng. R. Cas., N. S., 564; *Foulk v. Wilmington City Ry. Co.* (Del. Sup'r Ct.), 19 R. R. R. 541, 42 Am. & Eng. R. Cas., N. S., 541; *Smith v. Minneapolis St. Ry. Co.* (Minn.), 19 R. R. R. 536, 42 Am. & Eng. R. Cas., N. S., 536.

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horse, and the motorman, at the same time, uses the brakes and brings the car to a standstill, and then the driver urges his horse on, and the motorman simultaneously releases the brakes, it is a question for the jury whether both driver and motorman were misled, each by the act of the other, to judge that each was yielding the right to cross first, or whether the driver, having acquired a right to cross which he might judge must have been recognized by the motorman, might not have also reasonably judged that the stopping of the car showed such recognition, and whether the driver's crossing under those circumstances was negligent, and whether the motorman's release of the brakes was negligent.

(Syllabus by the Court.)

Appeal from Circuit Court, Essex County.

Action by Adolph Weinberger against the North Jersey Street Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Hobart Tuttle, for plaintiff in error.

James M. Trimble, for defendant in error.

MAGIE, Ch. The argument in behalf of plaintiff in error was first directed to error alleged to have been committed by the trial judge (1) in refusing to grant a motion for a nonsuit at the close of the case for plaintiff below; and (2) in refusing to direct a verdict in favor of the defendant below at the close of the whole testimony. These refusals were duly excepted to, and error has been assigned on each. As, under our practice, these assignments present the same question, they are usually and properly considered together, and must be so considered in this case. The injury for which plaintiff below sought damages was the result of a collision between a trolley car of the defendant below, with a wagon in which plaintiff below was driving.

The contention is that the motion for nonsuit and for direction of a verdict for defendant below should have been granted (1) because upon the whole evidence no negligence of the motorman running the trolley car was shown; or (2) because the whole evidence conclusively showed negligence on the part of plaintiff below which contributed to his injury. In dealing with such questions (which are pure questions of law), it must be borne in mind that it is not the province of this court to determine whether the verdict on which this judgment is founded is supported by the weight of evidence presented on the trial. Our function is limited to determining whether, upon the testimony of witnesses to whom the jury might give credit the court properly submitted the case to the jury. My examination of the evidence leads me to the conclusion that the trial judge properly submitted to the jury both questions, viz., that as to the negligence of the motorman on the trolley car, and that as to the negligence of Weinberger. In my judgment, the jury, if they gave credence to the witnesses, or some of them, might have found the following facts. The trolley car was running easterly, on the southerly one of two tracks laid in Orange street.

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There was a down grade in the direction in which it was running. Weinberger was driving a slow-moving horse, attached to a wagon in which he was seated, down Boyden street from the north, intending to cross the trolley tracks to a point on Boyden street south of the tracks. Boyden street, on the south of Orange street, was not a direct continuation of Boyden street on the north of Orange street, but was somewhat further west. As Weinberger emerged from Boyden street upon Orange street, and proceeded toward a point where he must cross the trolley tracks, the trolley car was at a distance which permitted and required him to form some judgment as to his right to cross, under the doctrine of this court in *Electric Rwy. Co. v. Miller*, 59 N. J. Law, 423, 36 Atl. 885, 39 Atl. 645. And whether he might not proceed to cross, upon the assumption that the trolley car was furnished with appliances to reduce speed and stop, and a motorman to use such appliances, under the doctrine of *Cons. Tract. Co. v. Lambertson*, 59 N. J. Law, 297, 36 Atl. 100, approved in this court in 60 N. J. Law, 452, 38 Atl. 683.

The case of *Earle v. Cons. Tract. Co.*, 64 N. J. Law, 573, 46 Atl. 613, was decided here by a divided court. Neither of the opinions delivered therein received the approval of a majority of this court. The difference of opinion indicated thereby was obviously not in respect to legal rules or principles, but only in respect to their applicability to the facts disclosed by the evidence in that case. The judges were not in accord as to those facts. But it is evident that neither opinion denies the doctrine, afterward expressed in this court, that trolley cars and travelers on public streets have equal rights in every respect, except that the trolley cars may not deviate from their track. *Searles v. Elizabeth Rwy. Co.*, 70 N. J. Law, 388, 57 Atl. 134. The trolley car and the driver of a team may each acquire a right of way to cross, as against the other, and while it was intimated in one of the opinions in the *Earle Case*, that a driver with a right of way would be negligent in persevering in crossing, when he perceived, or ought to have perceived, that the motorman was not yielding to his just claim, I think the doctrine, if sound, is not applicable to this case. For, as the trolley and the wagon approached the crossing, both the motorman and Weinberger checked their progress. The motorman brought the car nearly, or quite, to a standstill. Weinberger checked his slow-moving horse. Then each, it might be found, simultaneously proceeded. The motorman released his brakes. The plaintiff below drove on, and, as he perceived the car coming upon him, urged his horse, with whip and cries, to cross. He succeeded in crossing so far that the car only struck his hind wheel. Upon the evidence, I think the jury might find that Weinberger reached the immediate vicinity of the crossing at such a distance from the approaching car as to leave it a question whether he might not reasonably judge that he had acquired a right to cross, and to expect that the trolley car would respect his right; and that

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when Weinberger saw the car diminish its speed and stop, or nearly stop, he might reasonably judge that the motorman had recognized his right, upon which judgment he proceeded to cross. And the jury might also find that the motorman released his brake, and that Weinberger urged on his horse practically simultaneously. Upon such facts, if found, it might possibly be inferred that the motorman and Weinberger were each misled by the act of the other, and that the collision resulted from acts of each which were not blamable. But other inferences might be drawn therefrom, such as that Weinberger had acquired the right of way to cross before the trolley car, that the motorman should have recognized that right, that, by bringing his car to a stop, he justified Weinberger's judgment that he was yielding that right, and that the release of the brakes was then a negligent act, and that Weinberger's proceeding to cross was not negligent. The case, in either aspect, was one proper to be submitted to the jury. A case almost identical with this was disposed of in this court in the same manner. *Van Cott v. No. Jersey St. Ry. Co.*, 72 N. J. Law, 229, 62 Atl. 407.

It is further argued in behalf of plaintiff in error, that reversible error was committed by the trial judge in refusing to charge, as requested, that if the jury believed the testimony of Dr. Baldwin (a witness for plaintiff in error), their verdict should be for the defendant. No error is found in this refusal. In the first place, upon the testimony of that witness, the jury might find negligence in the motorman in releasing the brakes after bringing the car to a stop, and that Weinberger, if entitled to the right of way, might reasonably infer that the car was stopped in recognition of that right, and so proceed to cross. In the next place, while a trial judge may be properly asked to charge the legal rules pertinent to such facts as the jury might find upon all the evidence, he cannot be required to direct the jury to the testimony of a single witness, and on their behalf of it to instruct for a verdict. A request for a charge of pertinent legal principles if the jury found certain acts specified, would have been proper. But the charge requested would have left to the jury to recall the facts testified to by this witness, and would have required them to find for the defendant below without the guidance of any rules of law. Moreover, it would have the tendency to improperly lead the jury to believe that the evidence of that witness might be received and relied on without reference to the testimony of other competent witnesses. Lastly, it is urged that the trial judge erred in refusing to charge as requested by plaintiff in error, "that if the jury believe that the plaintiff (below) took a chance of collision in attempting to cross before the car, he cannot recover." The bills of exception show that the request was not absolutely denied, but it was charged in a different form which seems to be entirely unobjectionable.

No error being found, the judgment must be affirmed.

PETERSON *v.* SOUTH & W. R. R.

(Supreme Court of North Carolina, Dec. 4, 1906.)

[55 S. E. Rep. 618.]

Railroads—Operation—Permissive License.*—By carrying on its cars venders of fruit, etc., for sale to passengers, a railway company does not invite the public to enter its trains at stations for the sole purpose of making purchases, and the company's failure to object to persons frequently doing so does not create more than a permissive license.

Same—Action for Injuries.†—Where one went upon a railway train at a station for the sole purpose of purchasing fruit from a news agent, the company was not liable for his injury, resulting from his being thrown from the car by the jerking of the train, though no signal was given before the train started, since a railway company is liable to permissive licensees for wanton negligence only.

Appeal from Superior Court, Mitchell County; Cooke, judge.

Action by Moses Peterson against the South & Western Railroad. From a judgment for plaintiff, defendant appeals. Reversed.

Moses Peterson on his own behalf testifies: "I was at Hunt-dale, in this county, 2d May, 1903. I went up on the train to that place and got off about 12 o'clock. The train returning passed there about 5 or 6 on its way to Johnson City. I live in Yancey county, and was about to start home on my wagon when the train came on; but while it was stopped at station I went on the train to purchase some lemons. It was a mixed train, and I got on a freight car where the lemons were. There was a door on each side. There were steps to the door, up which I went. Moses Wilson and Van Adkins went on with me. There was a man in there standing in one corner, and had lemons and some other fruit to sell. They were in the rear end of the car. The car doors were about four feet wide. Both doors were open. I reached him a dollar and told him to give me three lemons. He says, 'The train is going to start in a minute.' I says, 'Well,

*For the authorities in this series on the question, who are licensees, see foot-notes appended to *Gulf, etc., Ry. Co. v. Matthews* (Tex.), 19 R. R. R. 493, 42 Am. & Eng. R. Cas., N. S., 493; *Wagner v. Boston Elev. Ry. Co.* (Mass.), 19 R. R. R. 187, 42 Am. & Eng. R. Cas., N. S., 187; foot-notes appended to *Louisville & N. R. Co. v. Redmon's Adm'x* (Ky.), 18 R. R. R. 737, 41 Am. & Eng. R. Cas., N. S., 737; *Houston & T. C. R. Co. v. Turner* (Tex.), 18 R. R. R. 631, 41 Am. & Eng. R. Cas., N. S., 631; *Williamson v. Southern Ry. Co.* (Va.), 18 R. R. R. 492, 41 Am. & Eng. R. Cas., N. S., 492.

†For the authorities in this series on the subject of the care due licensees, see foot-notes appended to *Wagner v. Boston Elev. Ry. Co.* (Mass.), 19 R. R. R. 187, 42 Am. & Eng. R. Cas., N. S., 187; *Dalin v. Worcester Con. St. Ry. Co.* (Mass.), 16 R. R. R. 476, 39 Am. & Eng. R. Cas., N. S., 476; foot-notes appended to *Fremont, etc., R. Co. v. Hagblad* (Neb.), 15 R. R. R. 226, 38 Am. & Eng. R. Cas., N. S., 226; *Pennsylvania Co. v. Coyer* (Ind.), 15 R. R. R. 218, 38 Am. & Eng. R. Cas., N. S., 218.

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hand me the dollar, and I'll get out of here.' He handed me the dollar, and as he reached it to me it dropped on the floor. I stooped down to pick it up. The train started, and gave a jerk, and threw me out of the door. I had picked up the dollar, and was straightening up, when the train gave the jerk. There was no signal given of the movement of the train, either by the bell or whistle. It threw me five or six feet to the door, and out of the door on the ground. The door was nearly four feet from the ground, and I fell five or seven feet from the car on my left side and leg, and broke both bones in my left leg. I don't know that it was the custom of the railroad company to sell lemons and other fruit from that car. It was the first time I had ever been there. I was not intoxicated. I had only taken one drink that day. That was just before dinner. When the jerk came, I was five or six feet from the door, towards the back end. Adkins and Wilson were both out before I was thrown. When the man said, 'The train is about to start,' they went out the other door from the one I was thrown out. The train had been delayed at the stop at that station for about half an hour on account of their screwing up some parts of the engine. I did not get out when the others got out, because I wanted my dollar. It dropped on the floor. I can't say whether the man dropped it, or I."

Enoch Bennett testifies: "I don't know that the railroad company kept fruit for sale in the car; but I know that somebody sold fruit in that car, for I have purchased it there myself, and I have seen other people than passengers get things in there. They would go in there, and come out eating oranges or other things. I was there for four months. There was no alarm given of the starting of the train that I know of. I was near enough to have heard it. It was the custom of the train at that point to give notice before starting. It started that day with a sudden jerk. There were two or three trains a day passing along there. I can't say whether the bell rang or the whistle sounded the 3d of May, but was the common thing for them to do it. I don't know whether the car had doors in the ends or not. I think Moses went in the side of the door."

J. R. Hughes testified: "It was the general custom that they sold the fruit in them at the different stations. They sold oranges, lemons, and other fruits. They had been selling that way for two or three months. What I saw of people purchasing fruit was generally they went to the door and the fruit was handed out to them; but I had seen persons that I remember now go in the car and purchase the fruit. I saw it sold, besides Hunt Dale, at Poplar Station and Relief—the first, once; the last, twice. Part of the time they would ring the bell, or the conductor would throw up his hands and hollow, 'All aboard!' The train started out faster than I ever knew it to do before. I think I recollect that the conductor was in such a position sometimes that he could have seen people who went in the car to purchase fruit."

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Moses Wilson testified: "I went in car with plaintiff. He went in first. There were end doors to the car, and I went up the steps and in at one of the end doors. When I got near the man who was selling the fruit, he said, 'The train is going to start.' Peterson says, 'Hand me my dollar.' I started to get off the car. I went at once, and went through the front end door and down the steps. I was four or five steps from the end door. Directly I got off the train started, and seemed to start sudden. I had just cleared the steps. It seemed to be a sudden jerk, a little more than common. It was for two or three weeks the general custom for people to go in the car to purchase fruits and ginger pop. I had bought these myself. Sometimes at the door; sometimes, when I thought I had time, I would go inside. The selling of fruit from the car had been carried on in the previous summer; not so much in the winter months. They kept ginger pop on ice in the summer. They did not keep ice there in winter. There are no side steps to the side doors. I had just passed in the car, and gone some two or three steps, when the man told me the train was going to start. The man said: 'The train is going to start in a minute, boys; get off.'"

Plaintiff rests. Defendant moves for judgment of nonsuit. Refused, and defendant excepts. Judgment and appeal.

J. C. Biggs, for appellant.

CONNOR, J. (after stating the case). The plaintiff was neither a passenger nor an employee. He had no contractual relation with defendant; hence it owed him no contractual duty, nor did defendant owe him any duty in respect to its business as a carrier of passengers. The rights and duties of the parties are therefore not in any degree affected by the fact that defendant was employed in the business of a common carrier. For the purpose of disposing of the exception presented upon the appeal, the car was the property and under the control of defendant, subject to the same power of management as the premises of a private citizen. Taken in the light most favorable to the plaintiff, he was upon the car by virtue of a permissive license, in the pursuit of his own business, with which defendant had no connection or concern. It cannot be successfully contended that, by carrying on its cars venders of fruit and confectioneries or newspapers for sale to its passengers, the company invites or induces the public to enter into them at stations for the purpose of making purchases. Besides being foreign to its legitimate business, to do so would seriously interfere with its power to discharge the duty, imposed by law, to carry passengers with all reasonable dispatch and safety. It is not necessary to hold, nor do we hold, that plaintiff was a trespasser, although we see no good reason why the defendant's agent and employee may not have forbidden plaintiff to enter the car for the purpose of buying fruit, just as a private citizen may forbid any person to

come upon his premises. His failure to do so is no more than a permissive license. If there be any evidence of an existing custom by which persons were in the habit of going into the car at stations for the purpose of buying fruit, it is very slight. It is very doubtful whether, when analyzed, there is any evidence of such custom. One witness, who undertakes to so testify, says: "What I saw of people purchasing fruit was, generally, they went to the door and the fruit was handed out to them; but I had seen persons, that I remember now, go in the car and purchase fruit"—at Hunt Dale once, and Poplar Station twice. Another witness says: "It was for two or three weeks the general custom for persons to go in the car and buy." The plaintiff says that he had never heard of such a custom. It was the first time he was ever there. It would impose hard lines upon the owner of premises, and in respect to the plaintiff the defendant occupies that position, if by permitting persons, in a few instances, to enter thereupon for their own purposes or convenience, a custom or usage should be established, imposing upon such owners the degree of care imposed in the case of invited guests or persons going in for the purpose of transacting business with the owners. *Winder v. Blake*, 49 N. C. 332; *Penland v. Ingle*, 138 N. C. 456, 50 S. E. 850; 12 Cyc. 1028. Discussing the question involved in this appeal, *Boynton, J.*, in *Pitts., etc., R. R. v. Bingham*, 29 Ohio St. 370, says: "It is therefore a right that the public have to enter upon the premises of the company at points designed or designated for receiving passengers, and upon compliance with the rules governing the transportation of persons to be carried over its road to such points thereon as they may desire. The right of the public to enter is coextensive with the duty of the company to receive and carry. It, however, cannot be extended beyond this. For all purposes not connected with the operation of its road, the right of the company to the exclusive use and enjoyment of the corporate property is as perfect and absolute as that of an owner of real property not burdened with public or private easements or servitudes."

Conceding, however, that there was evidence sufficient to be submitted to the jury, and that they found in accordance therewith, nothing more is shown than that, without objection on the part of defendant, persons usually went into the cars for the purpose of buying fruit, it cannot, as matter of law, amount to more than a permissive license and in respect to the duty imposed upon the owner to one thus entering, the rule is well settled. "A licensee, who enters upon premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes at his own risk, and enjoys the license subject to its concomitant perils. * * * Mere permission is neither inducement, allurement, nor enticement." *Pitts. R. R. v. Bingham*, *supra*. In a

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case involving the same principle, *Burbank v. Railroad*, 42 La. Ann. 1156, 8 South. 580, 11 L. R. A. 720, McEnery, J., says: "It is not stated in the petition, nor is there any evidence to show that the plaintiff was in the habit of going to the train to solicit custom for her boarding house. * * * Her presence on the platform and at the depot was not for the purpose of transacting any business with the company, * * * or for any purpose for which the depot had been built. She was at the depot, it is true, by a general license from the company, in the absence of any express prohibition. It would not be practical for a railroad company * * * to designate particular individuals who should be permitted to enter its depot. But there was no express or implied invitation to the plaintiff to go to the depot and on the platform. * * * There must have been, on the part of the company, such gross and wanton negligence that it was equivalent to intentional mischief" to make it liable. We had occasion to discuss the question regarding the measure of duty which defendant owed the plaintiff, as a mere permissive licensee, in *Quantz v. Railroad*, 137 N. C. 136, 49 S. E. 79, and find that the conclusion reached in that case is sustained by the additional authorities cited by the learned counsel for defendant.

Is there any evidence of a breach of duty or the absence of the degree of care imposed upon defendant not to wantonly injure plaintiff? The reason why it is negligent, in respect to passengers, to so manage the engine, approaching or leaving a station, as to suddenly jerk the cars, arises out of the duty of the engineer to know and keep in mind the fact that passengers and those who are entitled, by reason of relationship or otherwise, to accompany them, are usually in the act of going upon or leaving the car at stations. *Nance v. Railroad*, 94 N. C. 619; *Tillett v. Railroad*, 118 N. C. 1031, 24 S. E. 111; *Denny v. Railroad*, 132 N. C. 340, 43 S. E. 847. No such reason existed in respect to persons going upon the cars for purposes having no connection with business of defendant as a carrier of passengers. The engineer cannot be presumed to know that persons are using the car for other purposes than as passengers or employees. If he were required to await the pleasure of convenience of all persons who, from curiosity or other cause, were upon the cars, the common complaint of belated trains, with all of the attendant inconvenience, damage, and dangers to travelers, would increase more than tenfold. To require the company to keep guards at the doors of their cars to prevent persons going in for other than proper purposes would be impracticable. It is well known that the cars are for passengers and that, save within the exceptions noticed, no one else is entitled as of right to go into them. In many towns and cities, ordinances are made prohibiting persons having no business from going upon cars. In the absence of such ordinances, the only reasonable and workable rule is that which the law prescribes—in respect to passengers, the highest degree of care in the handling and

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movement of trains; in regard to mere permissive licensees, abstention from wanton injury. It is hardly possible to move a train of cars, especially a mixed train, as this one, without some jerk or jolt (*Smith v. Railroad*, 99 N. C. 241, 5 S. E. 896), and persons going upon them must take notice of the necessity of some jerk or jolt when the train moves. Of course, if the conductor, or any one having control of the train, had seen the plaintiff on the car, he should have warned him that it was about to move. It is said, however, that no signal was given that the train was about to leave the station. More than one answer may be given to this suggestion. The defendant owed no duty to plaintiff to give a signal. Again, the plaintiff was told that the train would leave "in a minute." He does not claim that he did not have time to get off. The fact is that the other persons who went in with him did get off safely. The cause of his injury was that either he or the fruit vender dropped the coin, and plaintiff was trying to recover it, thereby delaying his movement in leaving the car. Certainly the engineer could not be expected to know that some one was on the car buying lemons, that a coin had been dropped, and that it would require some time to recover it; nor is there any evidence that any one connected with the train knew that plaintiff was on the car. The fruit vender, who was on the same car, is not shown to have been jerked or jolted. The evidence that the jerk was any more severe than was proper or necessary in moving the train, as "made up," was very slight. The plaintiff, when he went into the car on his own business, without invitation or inducement, or, as he says, any knowledge of any custom for persons to do so, but simply by the silent acquiescence of defendant's agents, took the risk incident to the movement of the train. In the absence of any evidence of breach of duty on the part of the defendant, the motion for nonsuit should have been allowed. For refusal to do so the judgment must be reversed. *Hollingsworth v. Skelding* (at this term) 55 S. E. 212.

Reversed.

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(Supreme Court of Appeals of Virginia, Nov. 22, 1906.)

[55 S. E. Rep. 569.]

Negligence—Degree of Care.*—The care required to prevent the infliction of injury is always proportioned to the probability that exists that an injury will be done under circumstances which are known to exist, or, from past experience, may be reasonably expected to exist in a particular case.

*See extensive note, 17 R. R. R. 236, 40 Am. & Eng. R. Cas., N. S., 236; *Louisville Ry. Co. v. Esselman* (Ky.), 20 R. R. R. 627, 43 Am. & Eng. R. Cas., N. S., 627; *Sanders v. Central of Georgia Ry. Co.* (Ga.), 18 R. R. R. 7, 41 Am. & Eng. R. Cas., N. S., 7.

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Railroads—Injuries to Trespassers—Care Required.†—A railroad company is not required to anticipate and make provision for trespassers upon its tracks, but after it has discovered a trespasser upon its tracks it must exercise reasonable care to avoid injuring him, and, if his danger be obvious and imminent, it must use all the means which are available for his protection which are consistent with his higher duties to the passengers.

Same—Licensees.—Where licensees are such by the mere tolerance and acquiescence of a railroad company, or who have become such by repeated acts of trespass against the will of the railroad company, and in which the company has been compelled to acquiesce because of its inability to prevent, the company does not owe them the duty of provision.

Same.†—In an action for injury resulting in the death of plaintiff's intestate, walking along defendant's track at a place where it was used by pedestrians, evidence held to show that defendant was not guilty of negligence.

Same—Contributory Negligence.†—A licensee walking along a railroad track is charged with the duty to care for his own safety and with the knowledge that the track is frequently used for the passage of trains and the shifting of cars, and he must be considered as charged with knowledge that the usual method of shifting cars at such point was by making flying switches, which method had been in constant use for many years.

Same.§—Where a licensee on a railroad track was killed by a moving car, the doctrine of the last clear chance had no application; it appearing that defendant's servant on the train did not see deceased, being engaged in the performance of a necessary duty which he could not neglect.

Error to Corporation Court of Buena Vista.

Action by the administratrix of Stuart Farrow against the

†For the authorities in this series on the subject of the care due trespassers and licensees on railroad tracks, see foot-notes appended to *Yates v. Illinois Cent. R. Co.* (Ky.), 20 R. R. R. 272, 43 Am. & Eng. R. Cas., N. S., 272; foot-notes appended to *Flint v. Illinois Cent. R. Co.* (Ky.), 20 R. R. R. 269, 43 Am. & Eng. R. Cas., N. S., 269; foot-notes appended to *Hall v. Western & A. R. Co.* (Ga.), 19 R. R. R. 567, 42 Am. & Eng. R. Cas., N. S., 567; *Hulsey's Adm'r v. Louisville, etc., Ry. Co.* (Ky.), 19 R. R. R. 557, 42 Am. & Eng. R. Cas., N. S., 557; *Texas & N. O. Ry. Co. v. McDonald* (Tex.), 19 R. R. R. 503, 42 Am. & Eng. R. Cas., N. S., 503; foot-notes appended to *Copp v. Maine Cent. R. Co.* (Me.), 19 R. R. R. 199, 42 Am. & Eng. R. Cas., N. S., 199; *Louisville, etc., Ry. Co. v. Jolly's Adm'r* (Ky.), 19 R. R. R. 154, 42 Am. & Eng. R. Cas., N. S., 154; *Glenn's Adm'r v. Louisville & N. R. Co.* (Ky.), 19 R. R. R. 143, 42 Am. & Eng. R. Cas., N. S., 143; foot-notes appended to *Alabama Great So. R. Co. v. Guest* (Ala.), 18 R. R. R. 759, 41 Am. & Eng. R. Cas., N. S., 759; *Louisville & N. R. Co. v. Redmon's Adm'r* (Ky.), 18 R. R. R. 737, 41 Am. & Eng. R. Cas., N. S., 737; *Williamson v. Southern Ry. Co.* (Va.), 18 R. R. R. 492, 41 Am. & Eng. R. Cas., N. S., 492.

†For the authorities in this series on the subject of the care required of licensees for their own protection, see foot-notes appended to *Colorado & S. Ry. Co. v. Sonne* (Colo.), 18 R. R. R. 727, 41 Am. & Eng. R. Cas., N. S., 727.

§See foot-note appended to *Barry v. Kansas City, etc., Ry. Co.* (Ark.), 18 R. R. R. 735, 41 Am. & Eng. R. Cas., N. S., 735; foot-notes appended to *Green v. Los Angeles Term. Ry. Co.* (Cal.), 18 R. R. R. 192, 41 Am. & Eng. R. Cas., N. S., 192; *Vicksburg, etc., Ry. Co. v. Barmore* (Miss.), 19 R. R. R. 144, 42 Am. & Eng. R. Cas., N. S., 144; foot-note appended to *Holland v. Seaboard Air Line Ry. Co.* (N. Car.), 15 R. R. R. 787, 38 Am. & Eng. R. Cas., N. S., 787.

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Chesapeake & Ohio Railway Company. From a judgment for plaintiff, defendant brings error. Reversed.

Hugh A. White, for plaintiff in error.

R. L. Parrish, for defendant in error.

KEITH, P. This action grows out of the death of Stuart Farrow under the following circumstances: The regular local freight train on the branch line of the Chesapeake & Ohio Railway, between Glasgow and Lexington, Va., was engaged at Buena Vista, a station on that road, in shifting the cars that composed the train when it arrived at Buena Vista. In doing this work it became necessary to move four empty box cars from the paper mill over what is known as the "transfer" track, between the Chesapeake & Ohio and the Norfolk & Western Railroads. For this purpose the engine, to which one car was attached, moved up to the paper mill and was there coupled to the four box cars that were to be moved. This engine with the attached cars then backed out; the train consisting at the time of one box car, then the engine, and then the four box cars, towards which the engine was headed. From the paper mill to the point of the accident which subsequently occurred it is upgrade, and from that point to the station of Buena Vista, in which direction the train was moving, there is a downgrade. When the train thus made up had attained considerable speed, one of the brakemen, who was stationed on the pilot of the engine, cut loose the four empty box cars attached to the front of the engine, and the engine ran on along the main line past the transfer switch, the idea being that the impetus which the four following cars had attained, aided by the downgrade on which they had to run, would carry them on into the transfer track after they had been detached from the engine; thus making what is known as a "running," "flying," or "gravity" switch. The evidence shows that this was the usual and only method employed in making the necessary transfer of cars at this station. The tracks and switches along which this train passed after it left the paper mill are all within the corporate limits of the city of Buena Vista, but neither the main track nor the switches, as far as the facts of this case are concerned, occupy or are crossed by the streets of the city of Buena Vista; but it does appear that the right of way and tracks of the railway company at the point of the accident were constantly used by pedestrians.

It seems that Stuart Farrow was upon the track; that he stepped off in order to avoid the engine which was approaching him from the rear; that, as soon as the engine passed, he stepped back upon the track, and was almost immediately—after he had taken two steps, according to one eyewitness, and after he had taken eight or ten steps according to another eyewitness—run over by the box cars which had been detached from the engine, and received injuries from which he died. Upon the front end

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of the box car, next to and following the engine, the conductor, a careful and prudent officer of the Chesapeake & Ohio Railway, was stationed, on the lookout to prevent accidents. A cow got upon the track just in front of the engine and car, and the engineer gave the alarm signal, thereupon the conductor ran to the rear of the car upon which he was stationed in order to apply the brake in obedience to the alarm signal, and just at that moment, Stuart Farrow, the engine having passed him, stepped upon the track and received the injury of which he died.

His administratrix brought suit, and the jury upon the demurrer to the evidence rendered a verdict in her favor, upon which the court entered the judgment to which the Chesapeake & Ohio Railway Company applied for and obtained a writ of error.

"Negligence, constituting a cause of civil action, is such an omission, by a responsible person, to use that degree of care, diligence, and skill which it was his legal duty to use for the protection of another person from injury as, in a natural and continuous sequence, causes unintended damage to the latter." *Shear. & Red. on Neg. (5th Ed.) § 3.*

The degree of care and skill required is influenced and determined by the conditions existing at the time and place of the act under investigation. The duty with respect to the operation of a railroad occupying a street in a populous town, or crossing a street in such a town, or a public highway, requires the exercise of ordinary care. So the duty of a railroad is to exercise ordinary care in crossing a public highway in a country. In all these cases the duty is expressed by the term "ordinary or reasonable care to prevent injury," but it means reasonable or ordinary care in the light of all the surrounding facts and circumstances, so that the care required to prevent the infliction of injury is always proportioned to the probability that exists that an injury will be done under circumstances which are known to exist, or from past experience may be reasonably expected to exist in a particular case. A railroad company is not required to anticipate and make provision for trespassers upon its tracks; but, after it has discovered a trespasser upon its tracks, it must exercise reasonable care to avoid doing him an injury, and, if his danger be obvious and imminent, it must use all the means which are available for his protection which are consistent with its higher duties to others. *Seaboard, etc., R. Co. v. Joyner, 92 Va. 354, 23 S. E. 773.*

With respect to licensees the law has been, as we think, correctly stated in recent cases decided by this court.

In *N. & W. Ry. Co. v. Wood, 99 Va. 156, 37 S. E. 846*, where the plaintiff was standing on the platform of a freight depot and was injured by a freight train that ran against the platform, Judge Buchanan, delivering the opinion of the court, said: "Being there as a mere licensee, the defendant did not owe him the duty of maintaining its roadbed, switches, and

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connected appliances in proper condition for running its trains, or of providing and using proper and safe trucks, couplings and machinery on its cars, or of properly inspecting the same, or of employing competent servants to manage its trains, or to run them at a safe and proper rate of speed; the general rule being that a bare licensee—that is, one who is permitted by the passive acquiescence of the railroad company to come upon its depot platform for his own purposes in no way connected with the railroad—is only relieved from the responsibility of being a trespasser and takes upon himself all the ordinary risks attached to the place and the business carried on there.” In support of the law as thus stated, a number of authorities are cited, to which reference is here made.

In *Williamson v. Southern Ry. Co.*, 104 Va. 152, 51 S. E. 195, 70 L. R. A. 1007, a licensee had been injured by a train of the defendant company, and it was contended by counsel that, while a railroad company may run its trains on a bright moonlight night without lights on its engines, “if there is no moon, or the moon is obscured so as to make the night dark, it must, for the protection of bare licensees, provide its engines with artificial lights, or be held guilty of a failure to perform a legal duty due to such licensees.” Speaking to this contention.

Judge Harrison said: “To maintain this view would destroy the established rule that a railroad company is under no duty to make previous preparation for the protection of mere licensees; for, if they must provide lights for their protection on a dark night, it could with equal propriety be urged that on a downgrade, which it is here contended so reduced the noise of the train as to destroy its value as notice, the company should be required to substitute other noises as notice of its approach. It could with equal force be contended that its machinery and appliances, other than lights, should be in order, that competent employees should be provided, and that the speed of its trains should be so regulated as to provide for the increased danger of a dark night to the licensees. Many things could be done which would add to the facility and safety with which bare licensees might, for their own convenience, use the private property of the railroad, but enough has been said to indicate how difficult, if not impossible, it would be to ingraft upon the rule mentioned any exception without ignoring the property rights of the railroad company. There is no contradiction in the rule holding that the defendant company must keep a reasonable lookout to avoid injuring bare licensees, and at the same time providing that it is under no obligation to furnish lights for its engines on a dark night for the protection of such persons. There is no obligation upon the defendant to do anything to make the conditions more favorable than the natural surroundings make them. The obligation is not an absolute one to discover the plaintiff, but it is only the duty of using ordinary care to keep a reasonable

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lookout under the conditions and circumstances existing at the time the point is reached where the licensee may be reasonably expected."

The syllabus to that case is as follows: "A railroad company owes no duty of previous preparation for the protection of mere licensees. Its sole duty is to use reasonable care to discover and not to injure such persons when they may reasonably be expected to be on its tracks at a particular point. The obligation is not an absolute one, but it is only to use ordinary care for their protection, under conditions and circumstances as they actually exist at the time and place where the licensee may be reasonably expected."

In the still more recent case of *N. & W. Ry. Co. v. Stegall*, Adm'x, 105 Va. —, 54 S. E. 19, this court has held that "a railroad company does not owe the duty of prevision to a bare licensee on its tracks, nor does it owe him the duty of employing competent servants to manage its trains, or to run them in any particular manner, or at a particular rate of speed." And this we understand to be the established law with reference to bare licensees; that is to say, licensees who are such by the mere tolerance and acquiescence of the company, and not by its express invitation, licensees it may be who have become such by repeated acts of trespass over the protest and against the will of the railroad company, and in which the railroad company has been compelled silently to acquiesce because of its inability to prevent.

We cannot say that it is negligence per se for a railroad company to make a "running," "flying," or "gravity" switch, under the conditions existing at Buena Vista. The uncontradicted evidence is that it was the usual and customary mode of transferring cars; that it was under all the circumstances the most expeditious and safest mode of shifting cars; that it had been in use from the time the railroad was constructed, and was done almost every day in the year and sometimes more than once a day. Upon the front of the box car next to the engine the conductor of the train was stationed, and, upon an alarm signal being given by the engineer, he went to the rear of that car to apply the brakes, as it was his duty to do. The cases we have cited established the proposition that it was the duty of the company to use reasonable care to prevent injury to licensees upon its tracks at this point, but it was not the duty of the company to have a special lookout established for that purpose, nor was it the duty of the conductor to disregard the signal of the engineer, which required him to apply the brakes, in order to keep a constant supervision over the track to see that a licensee who had avoided the engine did not fail to turn his head to see that the track was clear before he returned to it. To do so would be to impose upon the railroad company a higher degree of duty than the law imposes, which requires the exercise of ordinary and reasonable care, and

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would be in direct opposition to the cases of *N. & W. Ry. Co. v. Wood and Williamson v. Southern Ry. Co.*, supra.

While the deceased was a licensee, he was still charged with the duty to care for his own safety. He was charged with the knowledge that this track was frequently used for the passage of trains and the shifting of cars, and he must be considered as charged with the knowledge of a method of shifting cars which had been in constant and daily use for many years.

The doctrine of the last clear chance has no application to this case. Farrow was not in danger until, the engine having passed, he stepped back upon the track in front of the box cars, and there is no evidence that the defendant company knew, or could have known, of his position of danger in time to avert the accident. On the contrary, the conductor says that he never saw the man until after he had been run over by the cars. He was not seen, because, as we have already said, the conductor was at the moment engaged in the performance of a necessary duty—a duty which he could not neglect without danger of collision with the engine, and injury to persons and property as the probable consequence.

Upon the whole case, we are of opinion that there was no evidence of negligence before the jury, and that the demurrer should have been sustained; and this court will proceed to enter such judgment as the circuit court should have entered.

BUCHANAN, J., absent.

INDIANAPOLIS TRACTION & TERMINAL CO. v. KIDD.

(Supreme Court of Indiana, Nov. 27, 1906.)

[79 N. E. Rep. 347.]

Appeal—Complaint—Attack.—A complaint will be upheld when first attacked on appeal if the facts alleged are sufficient to bar another suit for the same cause of action.

Street Railroads—Rights in Streets.*—A street railroad company has no superior and predominant right to the use of the streets of a city on which its tracks are laid over the rights of other users, except the right of way when required.

Same—Pedestrians—Use of Street—Care Required.*—Where a street on which defendant's street car tracks were located was covered with melting snow and ice to a depth of from six to fourteen inches except the space between the rails, which was paved with brick and practically free from obstructions, the pedestrian was entitled to use such space for passage, using ordinary care for her own safety, and was not bound to assume that she would be run into by a car approaching her from the rear at an excessive rate of speed, at broad daylight, on a straight track, without warning.

*For the authorities in this series on the subject of the mutual rights and duties of street railways and other users of streets, see foot-notes appended to *Halloran v. Worcester Consol. St. Ry. Co.* (Mass.), 20 R. R. R. 582, 43 Am. & Eng. R. Cas., N. S., 582.

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Same—Street Car Drivers—Degree of Care.†—Where a street car was being propelled along a city street at a speed of from 20 to 25 miles per hour, at a point where persons on foot or in vehicles were constantly passing and repassing, the ordinary care required of the driver was a high degree of watchfulness and vigilance to prevent accidents.

Trial—General Verdict—Special Findings.—Special findings will override the general verdict only when both cannot stand and the antagonism is apparent on the face of the record, beyond the possibility of being removed by any evidence legitimately admissible under the issues.

Street Railroads—Injuries to Pedestrians—Contributory Negligence—Proximate Cause.‡—Plaintiff was struck and injured, while walking along defendant's street car track, by a car which approached her from the rear without warning at a high rate of speed. The track was straight and the motorman could have seen plaintiff for a distance of from a quarter to a half a mile. When plaintiff entered on the track, she looked in the direction from which the car approached, and again when she had proceeded half a square on her journey, but no car was then in sight. She listened continuously as she advanced, but failed to discover the approach of the car, the noise of which was deadened by the passing of a car in the opposite direction on the adjoining track. Held, that plaintiff's negligence, if any, in not keeping a constant watch for the approach of a car was the remote and not the proximate cause of her injury, and was, therefore, no bar to her right to recover therefor.

Same—Last Clear Chance.‡—The motorman in charge of the street car had the "last clear chance" of avoiding the injury, and his negligence in failing to do so was the proximate cause thereof.

Evidence—Opinions.—In an action for injuries to a pedestrian by being struck by a street car, questions "that would not prevent it, would it?" and "she could step off, could she not, and prevent the

†For the authorities in this series on the subject of the care required of those in charge of street cars to avoid collisions with other users of streets, see foot-notes appended to *Jacksonville Elec. Co. v. Adams* (Fla.), 20 R. R. R. 295, 43 Am. & Eng. R. Cas., N. S., 295; foot-notes appended to *Latson v. St. Louis Transit Co.* (Mo.), 19 R. R. R. 845, 42 Am. & Eng. R. Cas., N. S., 845; foot-notes appended to *Foult v. Wilmington City Ry. Co.* (Del. Sup'r Ct.), 19 R. R. R. 541, 42 Am. & Eng. R. Cas., N. S., 541; *Smith v. Minneapolis St. Ry. Co.* (Minn.), 19 R. R. R. 536, 42 Am. & Eng. R. Cas., N. S., 536; *Boudwin v. Wilmington City Ry. Co.* (Del. Sup'r Ct.), 19 R. R. R. 564, 42 Am. & Eng. R. Cas., N. S., 564.

‡For the authorities in this series on the question, what is, and is not the proximate cause of an injury, see foot-notes appended to *Hunter v. Atlantic Coast Line R. Co.* (S. Car.), 20 R. R. R. 55, 43 Am. & Eng. R. Cas., N. S., 55; foot-notes appended to *Central of Georgia Ry. Co. v. Duggan* (Ga.), 19 R. R. R. 803, 42 Am. & Eng. R. Cas., N. S., 803; foot-notes appended to *Little Rock, etc., Co. v. McCaskill* (Ark.), 19 R. R. R. 513, 42 Am. & Eng. R. Cas., N. S., 513; *Warren v. City Elec. Ry. Co.* (Mich.), 19 R. R. R. 164, 42 Am. & Eng. R. Cas., N. S., 164; *Byrd v. Southern Express Co.* (N. Car.), 19 R. R. R. 150, 42 Am. & Eng. R. Cas., N. S., 150; foot-notes appended to *Wise Terminal Co. v. McCormick* (Va.), 19 R. R. R. 23, 42 Am. & Eng. R. Cas., N. S., 23; foot-notes appended to *Louisville & N. R. Co. v. Mounce's Adm'r* (Ky.), 19 R. R. R. 1, 42 Am. & Eng. R. Cas., N. S., 1; *Ryan v. St. Louis Transit Co.* (Mo.), 18 R. R. R. 775, 41 Am. & Eng. R. Cas., N. S., 775; *Chicago City Ry. Co. v. Shaw* (Ill.), 18 R. R. R. 586, 41 Am. & Eng. R. Cas., N. S., 586; *Brammer's Adm'r v. Norfolk & W. Ry. Co.* (Va.), 18 R. R. R. 497, 41 Am. & Eng. R. Cas., N. S., 497.

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collision?" relating to the condition of the street adjacent to the track on which plaintiff was walking at the time of the accident, were objectionable in form as calling for an opinion of the witness.

Appeal—Harmless Error.—Where, in an action for injuries, the jury expressly found that, within 100 feet of the place of the accident, there was nothing to prevent plaintiff from stepping far enough from defendant's street car track to have avoided the passing car, by which she was struck, had she known it was coming, defendant was not prejudiced by the exclusion of evidence offered to prove such fact.

Same—Record—Briefs—Instructions.—Where instructions given at appellant's request were not set out either in full or in substance in appellant's brief, the Supreme Court would not search the record in order to make a comparison between such instructions and those given for appellee, in order to determine whether they were conflicting as alleged.

Same—Estoppel to Allege Error.—Where instructions given by the court independent of appellant's requests were correct, appellant could not procure the giving of an inconsistent or erroneous instruction and then complain on appeal of the error.

Husband and Wife—Injury to Wife—Medical Bills—Recovery.—Where a married woman, after being injured in a street car accident through defendant's negligence, incurred expenses for medical treatment on her own behalf, she was entitled to recover therefor as a part of her damages, though her husband was ordinarily chargeable with the payment of her medical bills.

Appeal—Verdict—Review.—Where a verdict is sustained by evidence and is not contrary to law, it will not be disturbed on appeal as against the weight of the evidence.

Appeal from Circuit Court, Hamilton County; Ira W. Christian, Judge.

Action by Lulu Kidd against the Indianapolis Traction & Terminal Company. From a judgment for plaintiff, defendant appeals. Cause transferred from Appellate Court under Burns' Ann. St. § 1337u. Affirmed.

F. W. Winter, W. H. Latta, and W. S. Christian, for appellant.

W. A. Ryan and Garin & Davis, for appellee.

MONTGOMERY, C. J. This is an action for damages resulting to appellee from appellant's alleged negligence in running one of its cars without warning at a high rate of speed against and over her while walking along its track. A reversal of the judgment is sought for the reasons: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) that the court erred in overruling appellant's motion for judgment in its favor on the answers of the jury to interrogatories; and (3) for error in overruling appellant's motion for a new trial.

The complaint was not challenged in the trial court. It is contended that the complaint upon its face discloses an assumption of the risk and contributory negligence on the part of the appellee, notwithstanding the allegations that appellee exercised due care and precaution for her safety, and that she was without fault. It is well settled that when a complaint is attacked for the first time in this court, it will be upheld if the facts alleged are sufficient to bar another suit for the same cause of action.

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We do not find the suggested defects to be real, and any want of certainty in the pleading was cured by the evidence and verdict, and we accordingly hold the complaint sufficient as against the present assault, upon numerous decided cases. *Lengelsen v. McGregor*, 162 Ind. 258, 70 N. E. 248; *City of South Bend v. Turner*, 156 Ind. 418, 60 N. E. 271, 54 L. R. A. 396; *Shoemaker v. Williamson*, 156 Ind. 384, 59 N. E. 1051; *Xenia, etc., Co. et al. v. Macy*, 147 Ind. 568, 47 N. E. 147; *Citizens', etc., R. R. Co. v. Willooby*, 134 Ind. 563, 33 N. E. 627; *Loeb v. Tinkler*, 124 Ind. 331, 24 N. E. 235; *Peters et al. v. Banta*, 120 Ind. 416, 22 N. E. 95; *Smith v. Smith*, 106 Ind. 43, 5 N. E. 411. In answer to special interrogatories the jury found the following facts: That, at the time of the accident, appellant had a standard-gauge double-track street railroad on East Tenth street in the city of Indianapolis, extending two or three squares to the east of the place of the accident and for a long distance westward, the tracks being five feet apart; that the street was paved with brick; that east-bound cars ran on the south track and west-bound cars on the north track; that appellee had lived in the neighborhood of the accident for four years, and was familiar with the location of the tracks and the manner in which cars were operated thereon; that the accident occurred in daylight on a clear day, and appellee at the time was 47 years of age, possessed of ordinary intelligence, and of good eyesight and hearing, and of the use of all her faculties and powers of locomotion; that appellee lived on the south side of Tenth street and her daughter lived on the same side east of her residence; that appellee started on foot to her daughter's home and had walked about 500 feet along appellant's track eastwardly before the accident occurred; that the car could have been seen by appellee, had she looked, for a distance of from one-fourth to one-half mile before it reached her, and she could have gotten out of the way by stepping five or six feet to either side had she known the car was approaching; that there was no evidence to show whether any noise was made by the approaching car, or whether appellee could have heard it approach with ordinary care; that appellant's tracks had been swept practically clean of ice and snow, and on the south side of the tracks there was, at the time and place of the accident, from six to fourteen inches of melting snow and ice, and about the same depth between the tracks; appellee's view westward of the place of the accident for 1,000 feet was unobstructed, and by looking westward she could have seen the approaching car when that distance away, and for a distance of 100 feet she could at any point have stepped out of the way of the car had she known it was approaching, but the noise of a west-bound car prevented her from hearing its approach; that on entering upon the tracks and again after she had proceeded about half a square appellee looked westward to ascertain whether or not a car was coming, but no car was

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then in sight; that the car was operated by electricity and was traveling at a rate of from 20 to 25 miles per hour, and the motorman did not see appellee or know that she would not leave the track until he was within 10 feet of her, and that, under existing conditions, the car could have been stopped in a distance of from 150 to 175 feet; that appellee looked and continuously listened, and used ordinary care to avoid the accident.

Appellant's counsel argue that judgment should have been rendered in favor of appellant upon these facts notwithstanding the general verdict, because appellee is shown to have been guilty of contributory negligence. This contention appears to be predicated upon a misconception of the rights of the respective parties to the use of the street. It is a familiar principle, frequently reiterated by the courts, that street railway companies have no superior and predominant right to the use of the streets upon which their tracks are located over the rights of other users, except the right of way when they require it. *Indianapolis, etc., R. Co. v. Darnell*, 32 Ind. App. 687, 695, 68 N. E. 609; *Indianapolis, etc., R. Co. v. O'Donnell*, 35 Ind. App. 312, 317, 73 N. E. 163, 74 N. E. 253; *Butelli v. Jersey City, etc., Ry. Co.*, 59 N. J. Law, 302, 304, 36 Atl. 700; *Baltimore City, etc., Ry. Co. v. Cooney*, 87 Md. 261, 266, 39 Atl. 859; *Rapp v. St. Louis Transit Co.*, 190 Mo. 144, 161, 88 S. W. 865. The highways are laid out for passage, and each passer in a vehicle or on foot has a right of passage over the same, subject to the condition that he does not unnecessarily interfere with the lawful exercise of a similar right by others. Pedestrians have a right to use any part of such highways, but the question whether a particular use is such as a reasonably prudent person would make must depend upon the attendant circumstances. When a certain portion of the highway has been paved as a sidewalk or otherwise reserved for the exclusive use of foot passengers, and the same is unobstructed and in suitable condition for such use, it may not be prudent to walk in the roadway set apart for the use of vehicles. In considering the question of appellee's alleged contributory negligence, due regard for the reciprocal rights, duties, and obligations of appellant must be observed. Appellant had no right to exclude appellee from its track upon the street, but had the right merely to require her to remove therefrom when she ascertained or was notified that the same was needed for the passage of one of its cars. It appears, from the facts specially found by the jury, that the street along which appellee was passing was covered with melting snow and ice to a depth of from six to fourteen inches, except the space between the rails of appellant's tracks, which was paved with brick and was practically free from all obstructions. This condition of the street explains appellee's use of the track. She was required to use ordinary care for her safety, and the duty which she owed

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to the company was to vacate the track when apprised that the same was required for the passage of a car. It must be borne in mind as against this motion that the jury were authorized to find that she had a right to assume that appellant's cars would not be run at an excessive rate of speed, and that she was not required to anticipate that a car upon a straight track in broad daylight would run her down from the rear without any warning. *Indianapolis, etc., Co. v. Marschke* (Ind. Sup.) 77 N. E. 945; *Indianapolis, etc., Co. v. O'Donnell*, 35 Ind. App. 312, 320, 73 N. E. 163, 74 N. E. 253; *Memphis, etc., Ry. Co. v. Haynes*, 112 Tenn. 712, 81 S. W. 374, 379; *Polacci v. Interurban St. Ry. Co.* (Sup.) 90 N. Y. Supp. 341; *Kolk v. St. Louis, etc., Co.*, 102 Mo. App. 143, 149, 76 S. W. 1050.

Appellant's servants in charge of the operation of its cars were required to exercise diligent and constant watchfulness for persons who might be upon or approaching the track. Such servants are required to take notice of obvious obstructions to the ordinary and free use of the street. The drivers of such cars are chargeable only with the exercise of ordinary care for the safety of other users of the street, but ordinary care in law implies a high degree of watchfulness and vigilance when propelling a car at a speed of 20 to 25 miles per hour through the streets of a populous city, where persons on foot and in vehicles are constantly passing and repassing, including the aged, infirm, and crippled, as well as children thoughtless and wanting in prudence and discretion. The accident to appellee occurred in daylight and at a point where the track from the west was straight, and she could have been seen by the most casual attention on the part of the motorman when the car was 1,000 feet distant. Appellee looked westward when she entered upon the track, and again when she had proceeded half a square on her journey, but no car was then in sight. She listened continuously as she advanced but failed to discover the approach of the car, and, under the circumstances shown, we are unable to say that she did not have a right to expect that she would be notified of its coming by the customary alarm signal. The jury specially found that the precautions taken for her safety by so looking and listening constituted ordinary care and prudence. We need not decide whether this is a conclusion or not. The rule is well settled that such special findings override the general verdict only when both cannot stand, and the antagonism is apparent upon the face of the record, beyond the possibility of being removed by any evidence legitimately admissible under the issues. *Pittsburgh, etc., Ry. Co. v. Lightheiser* (No. 20,582, October 31, 1906) 78 N. E. 103; *Indianapolis, etc., Co. v. Ott*, 11 Ind. App. 564, 568, 38 N. E. 842, 39 N. E. 529. We cannot say that there is any conflict between the general verdict, and the facts specially found by the jury in this case, or in other words that it affirmatively appears from such facts that appellee

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was guilty of contributory negligence. A right of action in favor of a person injured by the negligence of another is denied only where his own negligence proximately contributes to produce such injury. It should appear that the complaining party was actively and contemporaneously at fault at the time the injury of which he complains was wrongfully inflicted to preclude a recovery of damages. *Harrington v. Los Angeles Ry. Co.*, 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85; 1 *Sherman & Redf. on Negligence*, § 99. In this case it is manifest that appellee exercised special care and precaution for her safety when entering upon the track, and for some distance as she proceeded eastward. Immediately preceding the accident her back was toward the approaching car and she was prevented from hearing the noise ordinarily made by its approach by the running of a car westwardly on the north track, and no alarm was sounded to notify her of the impending danger. It follows, therefore, that, although appellee's conduct in walking with her back to the westward without a constant watchout for the approach of a car from that direction be characterized as negligent in some degree, yet she is not shown to have been at fault at and immediately before the time of the accident, and her so-called negligence in being in a place of danger under the circumstances shown was not a proximate, but only the remote, cause of her injuries. *Indianapolis, etc., Co. v. Schmidt*, 35 Ind. App. 202, 211, 71 N. E. 663, 72 N. E. 478; *Birmingham, etc., Co. v. Brantley*, 141 Ala. 614, 37 South. 698.

This case falls clearly with the rule that, where the negligence of the defendant is the proximate cause of the injury for which suit is brought, and that of the plaintiff only the remote cause, the plaintiff may recover notwithstanding his negligence; the doctrine in that respect being that the law regards the immediate or proximate cause which directly produces the injury and not the remote cause which may have antecedently contributed to it. This principle has been styled the doctrine of "last clear chance," and is regarded as an exception to the general rule forbidding recovery by a plaintiff guilty of contributory negligence. It is no departure from just principles, but a wholesome and humane doctrine, to hold that if, after the defendant knew, or in the exercise of ordinary care ought to have known, of the plaintiff's negligence, he could have avoided the accident, but failed to do so, the plaintiff can recover. In cases of this class, the subsequent negligence of the defendant in failing to exercise ordinary care to avoid injuring the plaintiff becomes the immediate or proximate and efficient cause of the accident, which intervenes between the accident and the more remote negligence of the plaintiff. The principle that the plaintiff's act or omission when only a remote cause, antecedent occasion or condition of the injury does not constitute such contributory negligence as precludes a recovery

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is quite generally accepted, and has been declared by many courts. 7 Am. & Eng. Ency. of Law, 375; Indianapolis, etc., Co. v. Smith, 36 Ind. App. —, 77 N. E. 1140; Southern Indiana R. Co. v. Fine, 163 Ind. 617, 72 N. E. 589; Indianapolis St. Ry. Co. v. Bolin, 36 Ind. App. —, 78 N. E. 210; Grand Trunk Ry. Co. v. Ives, 144 U. S. 408, 429, 12 Sup. Ct. 679, 36 L. Ed. 485; Inland, etc., Co. v. Tolson, 139 U. S. 551, 558, 11 Sup. Ct. 653, 35 L. Ed. 270; Birmingham, etc., Co. v. Brantley, 141 Ala. 614, 37 South. 698; Memphis St. Ry. Co. v. Haynes, 112 Tenn. 712, 81 S. W. 374; Baltimore Traction Co. v. Wallace, 77 Md. 435, 442, 26 Atl. 518; City, etc., Ry. Co. v. Cooney, 87 Md. 261, 268, 39 Atl. 859; Richmond Traction Co. v. Martin's Adm'r, 102 Va. 209, 45 S. E. 886; Kolb v. St. Louis Transit Co., 102 Mo. App. 143, 149, 76 S. W. 1050; Jett. v. Central Electric Co., 178 Mo. 664, 673, 77 S. W. 738; Rapp v. St. Louis Transit Co., 190 Mo. 144, 161, 88 S. W. 865; Di Prisco v. Wilmington City Ry. Co., 4 Pen. (Del.) 527, 57 Atl. 906; Orr v. Cedar Rapids, etc., Ry. Co., 94 Iowa, 423, 62 N. W. 851; Flynn v. Louisville Ry. Co., 62 S. W. 490, 23 Ky. Law Rep. 57; Richter v. Harper, 95 Mich. 221, 54 S. W. 768; Rider v. Syracuse, etc., Co., 171 N. Y. 139, 63 N. E. 836, 58 L. R. A. 125; Harrington et al. v. Los Angeles Ry. Co., 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85; Deans v. Wilmington, etc., R. Co., 107 N. C. 686, 12 N. E. 77, 22 Am. St. Rep. 902; Little v. Boston & Maine R. R., 72 N. H. 61, 55 Atl. 190; Coombs v. Mason, 97 Me. 270, 54 Atl. 728; El. Paso, etc., Co. v. Kendall (Tex. Civ. App.) 85 S. W. 61.

It is clear, from the facts found, that the driver of the car which was run upon appellee, by the exercise of ordinary care while giving attention to his duties could have discovered her presence and apparent ignorance of the impending danger, and is accordingly chargeable with such knowledge, in ample time to have prevented the accident, and it follows that the court rightly overruled appellant's motion for judgment in its favor.

Appellant's motion for a new trial alleged that the verdict is not sustained by sufficient evidence and is contrary to law, and that the court erred in refusing to permit witnesses for appellee, upon cross-examination, to answer the following questions: "That would not prevent it, would it?" and "she could step off, could she not, and prevent the collision?" and also in giving each of the instructions given at the request of appellee. The questions excluded related to the condition of the street adjacent to the track upon which appellee was walking at the time of the accident. The questions were objectionable in form, and called for an opinion of the witness upon facts and conditions which could be fully placed before the jury. American Telephone Co. v. Green, 164 Ind. 349, 354, 73 N. E. 707, and cases cited. It also affirmatively appears that no harm resulted to appellant from these rulings, even though they were conceded to be erroneous. In answer to interrogatory No. 30, the jury

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expressly found that, within 100 feet of the place of the accident, there was nothing to prevent appellee from stepping far enough from the track to be out of the way of the passing car, if she had known it was coming. The jury, therefore, found the fact and conclusion upon this point in accord with appellant's contention, and left no room for complaint.

The court gave 21 instructions at the request of appellee. Their number forbids detailed discussion, but they were applicable to the case, and in the main embodied legal principles declared in the cases of *Indianapolis, etc., Ry. Co. v. Schmidt*, 35 Ind. App. 202, 71 N. E. 663, 72 N. E. 478, and *Indianapolis, etc., Co. v. Darnell*, 32 Ind. App. 687, 68 N. E. 609, and were in accord with the law as announced and approved in the preceding part of this opinion.

The court gave 13 instructions at the request of appellant, and it is now insisted that some of them were in conflict with instructions given at the request of appellee. The instructions given at appellee's request were correct statements of the law applicable to the facts established by the evidence. The instructions given at appellant's request are not set out, either in full or in substance, in appellant's brief, and we are precluded by our rules from searching the record in order to make the comparison suggested. It is clear, at all events, that, if the instructions given by the court independently of appellant's request were correct, as we have found them to be, appellant could not be allowed to procure the giving of an inapplicable, inconsistent, or erroneous instruction and thereupon be heard to complain of such error. *Elliott's Appellate Procedure*, § 626.

The complaint alleged that, in attempting to cure herself and to heal her wounds, appellee had expended the sum of \$200 for doctor bills and medicine. The evidence showed that she had personally incurred a medical bill of \$170 on account of her injuries. The court charged the jury, in one of the instructions of which complaint is made, that, if they found for plaintiff, in estimating her damages, they might take into account the amount of money she had been compelled to expend, if any, in attempting to cure herself. It appears that she was a married woman, but, under the averments of the complaint and the proof adduced in support of the same, the instruction was proper. Ordinarily the husband is chargeable with the payment of the medical bills of the wife, but he is not so chargeable under all circumstances, and even in cases where the husband may be legally liable for such debts, that fact will not deprive the wife of the right and power to bind herself therefor, if she chooses to do so. If appellee personally contracted to pay these bills, as alleged and proved, she may recover the same in case she has a right of the recovery for the physical injury to which they were incident *Nelson v. Spaulding*, 11 Ind. App. 453, 39 N. E. 168.

It appears from the evidence that there was no sidewalk along East Tenth street where the accident occurred, but the space in-

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tended for a sidewalk was covered with mud and gravel thrown from the street in making excavations for street improvements. There was a space of eight feet between the south rail and the curb, covered with melting snow and ice from 6 to 14 inches in depth, unbroken either by pedestrians or vehicles. Pedestrians had been and were using the space between the rails in traveling east or west along that part of the street. Two other persons besides appellee were so using the street in that vicinity, at the time of the accident. The track westward was straight and substantially level for half a mile. The day was clear and the sun shining. The car approached at a speed at from 20 to 30 miles per hour, without sounding the gong or giving any warning, and ran from 185 to 200 feet, as given by one witness, after striking appellee, before it could be stopped. No reason was advanced by the motorman for his failure to observe appellee sooner than he did. It is apparent from these conditions that the motorman was required to be on the lookout for pedestrians using the track, and to have his car under such control as to avoid collision under ordinary circumstances. In the exercise of ordinary care he would have discovered appellee and her manifest peril and apparent unconsciousness of danger when far away, and, by the exercise of like care thereafter, he could have given her due warning or stopped the car and avoided the accident. The motorman testified that he observed appellee talking to a Mr. Patterson, and that she stepped from the side of the track immediately in front of the car when it was within 15 feet of her. The jury did not accept this explanation, and we cannot distribute their conclusion upon the weight of the evidence. The verdict is sustained by evidence, and is not contrary to law, and no error was committed in overruling appellant's motion for a new trial.

The judgment is affirmed.

LEE et al. v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri, Division No. 1, Feb. 26, 1906.)

[92 S. W. Rep. 614.]

Statutes—Laws of Another State.—Where plaintiff relies for his cause of action on the law of another state, that law is to be pleaded and proven as a fact.

Pleading—Petition—Sufficiency—Objection Raised at Trial.—Where an objection to a petition is made for the first time after trial has begun, it should be overruled, if the petition is susceptible of a construction that will constitute a cause of action.

Death—Action—Pleading—Petition—Sufficiency.—In an action for negligence causing the death of a citizen of Kansas, in which plaintiff relied for recovery upon the statute of Kansas authorizing the widow of a person killed by the negligence of another to maintain an action as deceased might have done if the negligence had not resulted in death, the petition did not directly allege that the facts

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stated therein would have given rise to a cause of action in favor of plaintiff under the laws of Kansas, but did set out facts sufficient to constitute a cause of action under the laws of Missouri. Held that, under Rev. St. 1899, § 629, requiring pleadings to be construed liberally, etc., the petition was sufficient as against an objection made for the first time after trial had begun.

Pleading—Defective Petition—Aided by Answer.—Where an action by a citizen of Kansas for negligence causing the death of a person also a citizen of that state, the petition contained no direct allegation that the facts stated would constitute a cause of action under the laws of Kansas, but the defendant joined issue upon allegations that the death was caused by defendant's negligence and affirmatively alleged that the facts stated constituted no cause of action under the laws of Kansas, which allegations were denied by plaintiff, the petition, if defective, was aided by the answer.

Death—Cause of Action Arising in Foreign State.*—In an action for death resulting from a negligent injury inflicted in the state of Kansas, plaintiff must rely upon the statute of that state both for the law governing the merits of the case, and for his legal capacity to sue.

Same—Action by Widow—Right to Sue in This State.—Rev. St. 1899, § 548, declares that when a cause of action accrues under the laws of another state, and the person entitled to the benefit of it is not authorized by the law of the foreign state to prosecute the action, the 'suit may be prosecuted in this state by a person to be appointed by the court here' for that purpose. Gen. St. Kan. 1901, pp. 1002, 1003, provides that if a person killed by the negligence of another, is a resident of the state and no personal representative has been appointed, an action may be maintained by the widow. Held, that the widow of a resident of Kansas, killed in that state by the alleged negligence of another, may sue in this state for the negligent injury, and the fact that in such suit she was unnecessarily appointed trustee for her children, did not either take away or increase her right of action.

Courts—Rules of Decision.—While, in an action for death caused by a negligent injury inflicted in another state, the court must yield to the decisions of the highest court of that state as to the law of that state, it is at liberty to differ from the judgment of the foreign court as to the application of the law to the facts.

Master and Servant—Personal Injuries—Questions for Jury—Assumption of Risk.—In an action for the death of a switchman, alleged to have been caused by negligent failure of the railway company to block its tracks in a switchyard, evidence held sufficient under the laws of Kansas to require submission to the jury of the question whether deceased was aware of the danger arising from the absence of blocks.

Same—Contributory Negligence.—In an action for the death of a switchman, alleged to have been caused by negligent failure of railway company to block its tracks in a switchyard, evidence held sufficient under the laws of Kansas to require submission to the jury of the question whether deceased was guilty of contributory negligence.

Same—Negligence of Master.—In an action for the death of a switchman, alleged to have been caused by negligent failure of railway company to block its tracks in a switchyard, evidence held sufficient under the laws of Kansas to require submission to the jury of the question whether defendant was negligent.

Same—Evidence of Negligence—Customary Safeguards.†—In an action against a railway company for the death of a switchman,

*See generally, foot-notes appended to *Bain v. Northern Pac. Ry. Co.* (Wis.). 12 R. R. R. 31, 35 Am. & Eng. R. Cas., N. S., 31.

†See extensive note, 18 R. R. R. 296, 41 Am. & Eng. R. Cas., N. S., 296.

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alleged to have been caused by negligence of defendant in failing to block its rails in a switchyard, evidence of general custom in well equipped yards to have tracks blocked, was admissible, but evidence that one or two other companies blocked their tracks, was not.

Appeal—Harmless Error—Admission of Evidence.—In an action against a railway company for the death of a servant alleged to have been killed because of defendant's negligent failure to block its tracks in a switchyard, in which it was undisputed that defendant had at one time blocked its tracks, the erroneous admission of evidence that certain other railways having switchyards in the town where the injury occurred had their tracks blocked, was harmless.

Master and Servant—Personal Injuries—Instructions.—In an action for negligence causing death, an instruction that if the jury found certain facts plaintiff was entitled to recover, unless they also found that deceased had assumed the risk or was guilty of contributory negligence as defined in other instructions, was not erroneous because of the absence of other instructions specifically defining either assumption of risk or contributory negligence, where all the facts upon which defendant based its claim that deceased had assumed the risk or was guilty of contributory negligence, were set out in other instructions which stated that if the jury found that such facts existed, plaintiff could not recover.

Appeal—Harmless Error—Instructions—Measure of Damages.—In an action for negligence causing death, in which damages were limited by statute to \$10,000, an erroneous instruction impliedly authorizing the jury to fix the damages at such sum, not exceeding \$10,000, as deceased might probably have earned during his expectancy of life, was not cause for reversal, where the probable earnings would have been about \$35,000 and the jury awarded only \$8,000.

Master and Servant—Injuries to Servant—Instructions—Assumption of Risk.—In an action for negligence alleged to have caused the death of a servant, requested instructions that if deceased had means and opportunities of knowing of the danger which caused his death plaintiff could not recover, were properly refused because disregarding the question as to whether or not the danger was such that the servant might reasonably have hoped to avoid it by the use of ordinary care.

Marshall, Burgess, and Fox, JJ., dissenting.

Appeal from Circuit Court, Jackson County; Edward P. Gates, Judge.

Action by Susan A. Lee and others against the Missouri Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Elijah Robinson, for appellant.

Frank P. Walsh, Rozzelle, Vineyard & Thatcher, and *John G. Park*, for respondents.

PER CURIAM. The following opinion by VALLIANT, J., in Division No. 1, is adopted as the opinion of the court in banc. BRACE, C. J., and GANTT, VALLIANT, and LAMM, JJ., concur. MARSHALL, J., dissents. BURGESS and FOX, JJ., dissent on the ground that in their opinion the deceased was guilty of contributory negligence.

VALLIANT, J. Plaintiff Susan A. Lee is the widow and the other plaintiffs are the minor children of Harvey A. Lee, de-

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ceased, who met his death in defendant's yards at Atchison, Kan., where he was in the service of defendant as a switchman. At the time of the accident deceased was one of a crew engaged in switching cars, he was walking or running between cars in a moving train in the act of drawing the coupling pin; his foot was caught and fastened in an unblocked space between a guard rail and a track rail, he was thrown down and run over and killed. The suit is founded on a statute of Kansas which is set out in the petition, the terms of which will be hereinafter stated. The negligence charged in the petition is that the blocking between the main rail and the guard rail had been allowed to become rotten, defective, worn out, and had disappeared; that defendant had neglected to block the interval and repair the defect, so that there was in fact no protection against entrapping the foot between the rails; the guard rail was defective and unsafe in that the ends thereof had not sufficient flare, the entrance to the same was short and narrow and calculated to seize and hold the foot of one walking over it; that defendant knew, or by the exercise of ordinary care would have known, the condition, yet failed to repair or remedy the defect and deceased was ignorant of it. The answer admits the relationship of the parties, the occurrence of the accident, but denies the allegations of negligence, pleads contributory negligence, also that the deceased was an experienced switchman, knew the condition of the tracks, yards, etc., and that under the laws of Kansas he had no right to recover, and none under the laws of Missouri. Reply general denial.

The suit was originally instituted by Susan A. Lee as widow and the minor children by John McKinney their next friend, appointed by the court for that purpose, but after the institution of the suit the next friend died, and thereupon the court, on the petition of Susan A. Lee, appointed her trustee for the children to prosecute the suit, and an amended petition was filed in the name of Susan as widow, and also as trustee for the children as plaintiffs. The record shows that the deceased was a resident of Kansas and no personal representative has been appointed to administer on his estate in that state. At the opening of the trial defendant objected to any evidence on the part of the plaintiffs, on the ground that the petition does not state facts sufficient to constitute a cause of action, for the reason that it is not alleged in the petition that the plaintiff's husband, if death had not ensued, would have been entitled to maintain an action against defendant under the laws of Kansas, and for the further reason that there is a defect of parties plaintiff. The objection was overruled, and exception taken.

The evidence on the part of the plaintiff as to the accident tends to show as follows: On April 26, 1899, about 6:45 in the evening, Harvey A. Lee was at work with a switching crew in defendant's yard at Atchison, Kan.; his duty was to draw the coupling pin, connecting cars in the train; the train was moving

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at a rate variously stated by the witnesses as from four to six or eight miles an hour, he was walking or running (according as the speed of the train may have been) between the cars, one hand on the head of the coupling pin to draw it as soon as it was loosened, the other holding the handhold of the car; the pin was held fast because of a curve in the track, and he walked or ran in that way for a distance variously estimated by the witnesses at from 50 to 150 feet, when one of his feet got caught in the space between the rails, the cars coming against him threw him down, broke his hold on the handhold, and he was run over and killed. The intervals between the guard rails and the track rails had at one time, as early as 1893 or 1894, all been blocked, but the blocks had, to a great extent, been worn out or had rotted and disappeared, so that at this time about one-third of the spaces were blocked, and two-thirds were not blocked. There were at that time fewer spaces blocked than there had been the year before. There were some blocks, at the time of the accident, in the immediate vicinity to the space in which this man's foot was caught, but none at that time in that space, but it had once been blocked, how long it had been unblocked was not shown, but one witness testified that he had observed it in that condition three weeks before the accident. Plaintiff was permitted, over the objection of defendant, to prove that the ground rails in the yards of the Santa Fe and of the Burlington at Atchison were blocked. Plaintiff introduced in evidence the following rule of the defendant company: "Rule 23. Great care must be used in coupling and uncoupling cars. Do not go between the cars unless they are moving at a slow and safe speed, or attempt to make any coupling unless the draw-bar and other coupling appliances are known to be in good order." On this point plaintiff's testimony tended to show that the rate of speed at which these cars were moving at the time was by railroad men considered slow, and that it was usual and customary for men to go between the cars moving in that way to uncouple them; that the foreman of the gang gave the signals to the engineer directing the moving of the train in switching. There were 50 or 60 guard rails in this yard. The foreman of the switch crew and one of the switchmen were examined as to their knowledge of the condition of the yard in respect of the blocking and they showed that they had not very distinct ideas of it—they had not paid very close attention to it. On cross-examination by defendant the foreman of the crew was asked: "Q. Now, if a man observes at all, it is easy enough for him to see the condition of the guard rails in a yard like that at Atchison, isn't it? A. I have been there five years and I never observed them. Q. I say if he observes at all? A. Yes, if he wants to look at it. Q. It is perfectly apparent, he can tell if he looks? A. Yes, he can if he look at them, yes, sir. Q. If a man were undertaking to post himself, he could, within

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a few days after beginning to work, know whether the guard rails were blocked or not, couldn't he? A. Why, yes; if he would look at them and over-sight his work in doing it, he might. Q. Now switching at the best is pretty dangerous work, isn't it? A. Very dangerous." The deceased was an intelligent experienced switchman. He had been working in this yard about nine months, but for the space of 21 days just prior to the accident he had been detained at home on account of a sick child and had been at work only three or four days when the accident occurred. The statute of Kansas, Gen. St. 1897, c. 95, art. 18, under which the suit is brought is as follows:

"Sec. 418. When the death of one is caused by the wrongful act or omission of another, the personal representatives of the former may maintain an action therefor against the latter, if the former might have maintained an action had he lived against the latter for an injury for the same act or omission. The action must be commenced within two years. The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased.

"Sec. 419. In all cases where the residence of the party whose death has been or hereafter shall be caused as set forth in section 422 of the Civil Code of 1868 (the next preceding section), is or has been at the time of his death in any other state or territory, or when being a resident of this state no personal representative is or has been appointed, the action provided in said section may be brought by the widow or when there is no widow by the next of kin of such deceased."

At the close of the plaintiff's evidence the defendant asked an instruction to the effect that plaintiffs were not entitled to recover, which instruction the court refused and defendant excepted. Defendant offered no evidence. The cause was submitted to the jury under instructions which will be referred to later. There was a verdict for plaintiff for \$8,000 damages and judgment accordingly. The defendant has appealed.

1. The first assignment of error is the overruling of defendants' objection to any evidence in support of the petition, because it does not allege that the deceased, if death had not ensued, could have maintained an action under the laws of Kansas. The petition does not state in totidem verbis that if deceased had survived the injury he could have maintained a suit in Kansas, but it does state facts which would under the law of this state have entitled him, if he had survived, to recover damages of defendant for the injury and then it sets out the statute law of Kansas which gives the right of action for the benefit of the widow and children in the event of his death. When one relies on the law of a foreign country or of a sister state for his right of action he is required to state in his pleading what the law of the foreign jurisdiction is, such

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a law is to be pleaded and proven as a fact. By the strict rules of pleading therefore the plaintiffs in their petition should have stated the law of Kansas applicable to the facts to show that the deceased, if he had lived, could, under that law, have maintained an action for damages, and if timely objection to the petition had been made by demurrer or otherwise it would doubtless have been sustained with the result that the plaintiffs would have leave to amend. But this court has often said that where an objection to the petition is made for the first time when the trial has begun it will be overruled if the petition is susceptible of a construction that will constitute a cause of action.

Under the facts stated in the petition the deceased, if death had not ensued, could, under the laws of this state if the injury had occurred here have maintained an action for damages against the defendant, and in the absence of any showing to the contrary we will presume that the law of Kansas is like the law of Missouri on that point and will construe the petition liberally. Section 629, Rev. St. 1899; *Flato v. Mulhall*, 72 Mo. 522; *Burdick v. Mo. Pacific Ry.*, 123 Mo. 221, 27 S. W. 453, 26 L. R. A. 384, 45 Am. St. Rep. 528. The defendant, by its answer, accepted the issue of fact tendered in the petition in the form as tendered, that is, without express reference to the laws of Kansas, the petition stated that the accident was caused by the negligence of defendant, and the answer expressly denied that fact. By so joining issue the defendant united with the plaintiff in inviting judgment on the facts as pleaded. And in addition to that the defendant in a further paragraph of its answer itself tendered the issue of the law of Kansas which the plaintiffs accepted by a general denial. If therefore, as a matter of strict pleading, the petition was defective it was aided by the answer. The court committed no error in overruling the objection to the introduction of any evidence in support of the petition.

2. The next assignment concerns the legal capacity of the plaintiff to maintain a suit under the Kansas statute. The injury complained of occurred in Kansas and the right of action declared on is given by the statute of that state, the plaintiffs must therefore stand on the Kansas statute both for the law governing the merits of the case and their legal capacity to sue. This is not a new question in this state. In *Vawter v. Railway*, 84 Mo. 679, 54 Am. Rep. 105, an employee of the railroad company was killed in Kansas through, as was alleged, the negligence of the servants of the company; his widow qualified as administratrix of his estate in the probate court of Schuyler county, Mo., and as administratrix sued to recover the damages for which the company was made liable by the Kansas statute. At that time the statute of Kansas conferred the right of action on the personal representatives alone of the deceased. Comp. Laws Kan. 1885, p. 656. It was held by this court that no one

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but the executor or administrator in Kansas could sue, that our statute expressly denied to an administrator in this state the right to maintain such a suit (sections 96 and 97, Rev. St. 1899) and that a foreign statute could not confer on an administrator in Missouri a right which the statute of his own state expressly withheld. *Oates v. Railway*, 104 Mo. 514, 16 S. W. 487, 24 Am. St. Rep. 348, was a case of like nature, except that the suit was brought by the widow, it was held that she could not sue because the Kansas statute limited the right to sue to the personal representatives of the deceased and did not extend it to the widow.

Since those cases arose, however, the Kansas statute in 1889 was amended, possibly with a view to meet those very decisions or decisions elsewhere like them, and it now provides that if the person killed is a nonresident of Kansas or, being a resident, if no personal representative has been appointed, "the action provided in section 422 may be brought by the widow, or when there is no widow, by the next of kin of such deceased." In section 422 it is expressly provided that: "The damages cannot exceed ten thousand dollars, and must inure to the exclusive benefit of the widow and children, if any, or next of kin, to be distributed," etc. Thus if the deceased resided in Kansas his administrator there could sue, and if there was no administrator his widow could sue, but, whichever sued, the damages recovered were for the exclusive benefit of the widow and children if any. Gen. St. of Kan. 1901, p. 1002-1003. Our statute (section 548, Rev. St. 1899) declares that when such cause of action accrues under the laws of another state, and the person entitled to the benefit of it is not authorized by the law of the foreign state to prosecute the action the suit may be brought and prosecuted in this state by a person to be appointed by the court here for that purpose. In *McGinnis v. Mo. Car & Foundry Co.*, 174 Mo. 225, 73 S. W. 586, 97 Am. St. Rep. 553, the cause of action accrued in Illinois where there is a statute similar in character to the Kansas statute, in which, however, the right of action is conferred on the personal representatives only of the deceased. Since the Illinois administrator could not maintain the action here, the widow who was entitled to the benefit of the action, caused McGinnis to be appointed in the circuit court in St. Louis for the purpose of bringing the suit, and the suit was brought in his name for her benefit. But this court held that it was beyond the power of our Legislature to confer the power to sue on a cause of action created by the Illinois statute on a person on whom the Illinois statute had not conferred it. The court per Marshall, J., said, loc. cit. 232 of 174 Mo. and page 588 of 73 S. W. (97 Am. St. Rep. 553): "In such case the statute creating the liability must confer upon a specified person the right to enforce the liability. Unless it does so no one can enforce it, because no one has a right under the general com-

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mon law to do so. When, therefore, a statute creates a liability and prescribes the person who shall have the right to enforce it; the two parts of the statute are component parts of the whole and it must be done exactly in the manner, and by the persons or agencies, that the statute prescribes. * * * In short, the whole matter depends upon the Illinois statute: That statute confers right of action upon the administrator and not upon the widow or next of kin. It is for their benefit, but they cannot maintain an action therefor. Our statute attempts to enforce the liability created by the Illinois statute, not through the person who alone is given the right under the Illinois law to enforce it, but through a person who would have no right to enforce the liability in that state." So our statute (section 548) was condemned as invalid. *Jones v. Railway*, 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434, arose under the Kansas statute. The suit was brought by the widow in her own right and as next friend for her infant child. It was objected to the petition in that case that there was a misjoinder of parties plaintiffs to wit, the infant was an unnecessary party, but the court held that inasmuch as the Kansas statute gave the widow the right to sue for the sole benefit of herself and her infant child she was the trustee of an express trust, and whilst it was unnecessary for her to have joined the infant it was immaterial that she did so. The court, referring to section 541, Rev. St. 1899, said: "But whilst the trustee of an express trust may sue in his own name without joining the person, for whose benefit the suit is prosecuted, he is not forbidden to join the beneficiary, and if he does so, the most that can be said in criticism of the act is that it was unnecessary." The reference to our statute in this connection was not for the purpose of basing it upon the right of the widow in that case to sue, because we there based her right to sue, as we must base the widow's right in this case, on the statute of Kansas, but it was to show that there was in our law nothing repugnant to her right to sue as agent of an express trust. The Kansas statute makes the widow, under the circumstances of this case, a trustee of an express trust, and expressly authorizes her, as such, to sue for the benefit of herself and her minor children. Reference in the *Jones Case* was made also to section 549, Rev. St. 1899, which is: "Whenever a cause of action has accrued under or by virtue of the laws of any other state or territory, such cause of action may be brought in any of the courts of this state by the person or persons entitled to the proceeds of such cause of action: Provided such person or persons shall be authorized to bring such action by the laws of the state or territory where the cause of action accrued."

From the decisions in the foregoing cases, the following conclusions are drawn: (a) The right of action given by the foreign statute cannot be maintained in this state in a suit by

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a. person on whom the foreign statute has not conferred the right to sue. (b) It cannot be maintained by a foreign administrator. (c) It can be maintained by one who has capacity otherwise to sue here and on whom the foreign statute has conferred the right. The Kansas statute confers the right on the widow to sue when no administrator has been appointed, which is the fact in this case, and our statute says that if the foreign statute confers the right on her to sue there she may sue in the courts of this state. She has brought this suit in her capacity of widow for the benefit of herself and her infant children, and although she has taken the unnecessary precaution to have herself appointed trustee for her children and adds that to her other capacity, that fact neither adds to nor mars her right of action, we hold that she was entitled to sue as she has done. Since the decision in the McGinnis Case above referred to, our General Assembly, doubtless acting on the suggestion therein made, has repealed section 548 as it then was and has enacted a new section in place of it wherein authority to sue in such case in courts of this state is conferred on foreign administrators, guardians, etc. Acts 1905, p. 95. That, however, does not affect this case which was pending in this court when that act was passed.

3. Defendant insists that under the law of Kansas the deceased, if he had lived, could not have maintained an action against the defendant, and therefore the plaintiffs cannot maintain this action. The argument is that under the decisions of the Supreme Court of Kansas the deceased was guilty of such contributory negligence, in working in the yards in the unblocked condition, that the court should have so declared as a matter of law and have nonsuited the plaintiffs. The decision on which this judgment is chiefly based is in *Rush v. Railway Co.*, 36 Kan. 129, 12 Pac. 582, decided in 1887. That was a case in which the plaintiff's intestate, a switchman, had come to his death by getting his foot caught in an unblocked track while attempting to pull a coupling pin and before he could extricate his foot the cars passed over him and killed him. That case was like in its facts to this except that the yard had never been blocked. The court said: "The railway was not out of repair, it was in just the same condition it was when it was originally constructed, and it was constructed in the yard where plaintiff's intestate worked, precisely as it was constructed in all the other yards belonging to the defendant, and in precisely the same manner as many other railways belonging to other companies were constructed. Again the court said: "It was not different from other guard rails in that yard, nor different from any of the other guard rails of the defendant's 5,000 miles of railway; nor different from the guard rails of many of the other railways in this country." The court held that the defect, if defect it was, was obvious and the danger was as apparent to the deceased as it was to

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the defendant. Other Kansas cases, which may be seen by reference to appellant's brief, are cited which in the main hold that if the danger is as obvious to the servant as it is to the master the court is justified in holding as a matter of law that the servant who continues in the service cannot recover if he is injured. In some of those cases the court designates it as assumption of risk and in others as contributory negligence. But in *Emporia v. Kowalski*, 66 Kan. 64, 71 Pac. 232, that court lays down the law in regard to assumption of risk in effect the same as it has often been declared by this court. At page 71 of 66 Kan., page 234 of 71 Pac., per Green, J., it is said: "It is contended that the defendant assumed the risk of injury for the falling of the pole, and, therefore cannot recover. While it is true the employee assumes the ordinary risks incident to his employment, the risks thus assumed by him, however, are those only which occur after the due performance by the master of those duties which the law imposes upon him." In that case the court refers with approval to *O'Neill v. Railroad*, 62 Neb. 358, 86 N. W. 1098, which was a case in its facts very much like the case at bar, wherein the Nebraska court at pages 360, 361 of 62 Neb., page 1099 of 86 N. W., said: "The defendant invokes the rule that a servant, by his contract of service, assumes the risks and dangers incident to his employment, and insists that such rule relieves it of liability for the injury sustained by the plaintiff. That the servant, by his contract of service, assumes certain risks, is true. Just what such risks are we are not required to determine in this case, because it is sufficient to say that the negligence of his employer is not one of the risks assumed. On the contrary, a servant has a right to assume that his employer has used ordinary care and prudence to insure his safety in the course of his employment."

We have gone through the Kansas cases cited by appellant, and also those cited by respondent, to discover what difference, if any, there is in the law of that state and our law in reference to the liability of the master to the servant in such case, and we discover no material difference. The Kansas court has not, in the cases that we have seen, emphasized the distinction between contributory negligence and assumption of risk as we have done, but in the main it has declared the law as we have declared it. We must yield to the decisions of the highest court of a sister state as to the law of that state, but we would be at liberty to differ from its judgment in the application of the law to the facts of a given case if we felt so constrained. The *Rush Case* was decided in 1887 when, according to the recitals in the opinion, the system of blocking the guard rails in a switch yard had not been adopted by this defendant, in any of its yards along its then 5,000 miles of tracks, and many other railroad companies had not adopted it. A switchman in the service of the defendant at that time had no right (the

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court thought) to expect the tracks to be safeguarded in this manner and in that view of the facts the court held that there was no cause of action. Since then 18 years have passed and railroad companies have gained by experience in many things. This company, as the evidence in the case at bar shows, had at the time of this accident adopted the blocking system, it had two yards in Atchison, one of which was fully blocked, and this one had been blocked, but in that respect it had been suffered to fall into decay and become out of repair, many of the blocks were worn out and rotten and had disappeared. The switchman of course could have seen this condition, and if one saw it and appreciated the danger and continued to work over it and was injured, the question of contributory negligence would arise, a question to be decided as a matter of law by the court or as one of fact by the jury; if there could be no two opinions about it, it was a question for the court, if men might reasonably differ about it then it was for the jury. This man had been working in that yard several months, but there was evidence tending to show that for the period of 21 days just prior to the accident he had been detained at home with a sick child and had been at work only three or four days. The foreman of the crew and another switchman of the crew were unable to remember whether the rails in the immediate vicinity of the accident were blocked or not; they gave the impression that in the hurry of their work they had no time to look for the blocks. The foreman testified that one could post himself as to the blocks if he would take the time to do so, if he would look for them and slight his work. We think whether or not the deceased knew the danger he was incurring from the absence of the blocks was, under the evidence, a fair question for the jury.

It is argued that he was guilty of negligence in running between the moving cars. Going between the moving cars for that purpose was the usual practice and was recognized as proper by the defendant. Rule 23 in evidence was couched in the form of a caution, but at the same time it indicated to the servant what his master expected of him. He was warned not to go between moving cars to uncouple them unless they were moving at a slow and safe speed. The evidence was that these cars were moving at what men in that line of business called slow speed. Just how fast the train was going was not definitely ascertained, it was put at four, six, or eight miles an hour. Whether he was running or walking depends on the speed of the car, if it was four miles he was walking if it was eight miles he was running. And so too as to the distance he went, it was variously estimated at from 50 to 150 or 200 feet. The speed of the cars and the distance covered were facts to be found by the jury. The evidence on these points was not what might be called conflicting, but different, according to the estimates of the different witnesses, and the

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jury were to judge from the various positions from which the different witnesses saw the accident, their capacity for making the estimates, etc., which was most reliable. *Illinois Central Railroad v. Cozby*, 69 Ill. App. 256, was a case quite like the case at bar in its facts and the rule of the company in evidence was like this rule 23 except that in one sentence it forbade the switchman to attempt to uncouple moving cars and in another authorized him to do so if they were not moving at a dangerous rate of speed. The court said: "The evidence shows that it was the custom to couple and uncouple moving cars in the Cairo yards. This practice was certainly known to the railroad authorities, and was not discouraged by them, except in this contradictory manner on paper. It is manifest that in extensive yards, where much switching is to be done, the business of a railroad company could not be transacted, if every train was brought to a dead halt in order that cars might be coupled or uncoupled. We cannot hold that Craiglow was necessarily guilty of negligence because he undertook to uncouple cars which were moving at the rate of two or three miles an hour." Under the evidence in this case the court would not have been justified in taking the case from the jury on the ground that the deceased was guilty of negligence. The evidence was also sufficient to justify the submission to the jury of the question of negligence on the part of the defendant in failing to furnish its servants a reasonably safe field in which to work. *Huhn v. Railway*, 92 Mo. 440. 4 S. W. 937.

4. Over the objection of defendant, evidence was admitted to show that other railroads had their yards at Atchison blocked. Evidence of a general custom in well equipped railroad yards would have been competent, but evidence as to the condition of the yards of one or two other companies was incompetent. But we do not think that evidence could have prejudiced the defendant. If it tended to prove anything it was that blocking the rails was an approved method of safeguarding the tracks. The evidence was undisputed that the defendant itself had adopted that method in its yards at Atchison and, in the absence of any evidence or suggestion to the contrary, it seems to be such a self-evident fact that proof on the point was unnecessary.

5. At the request of the plaintiffs the court gave the following instruction:

(1) "If you believe and find from the evidence that on April 26, 1899, Harvey A. Lee, was in the employ of defendant in its yard at Atchison, Kan., as switchman, and that the duties of said Lee required him to assist in the switching of cars therein, then it was defendant's duty to exercise ordinary care to provide him a reasonably safe place in which to work, and reasonably safe tracks and guard rails upon which to work. If, therefore, you believe and find from the evidence that on said day said Lee was, in pursuance to orders of defendant, engaged

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in uncoupling two moving freight cars on No. 4 track of defendant in Atchison, Kan.; that the right foot of said Lee, while he was performing said duty, slipped into the interval between the main rail and guard rail of said track; that thereby his foot was entrapped and he was unable to escape and the cars ran over him and killed him; that his death was caused by the blocking in said interval between said main rail and guard rail having disappeared therefrom, so that there was no protection against the entrapping of a foot in the space between the guard rail and the main rail; that at said time defendant knew, or by the exercise of ordinary care might have known, that said blocking had disappeared and that there was, therefore no protection against the entrapping of a foot therein, and negligently and wrongfully failed and omitted to repair the same, and that because thereof said rails and track were not reasonably safe for said Harvey A. Lee to work upon, then you will find a verdict in favor of plaintiffs, unless you further find and believe from the evidence that said Lee assumed the risk of said injury, or was guilty of negligence on his part contributing to produce his death as defined in other instructions given you." The criticism of this instruction is that it refers the jury to other instructions defining assumption of risk and contributory negligence and that there are no such other instructions.

There was an instruction defining ordinary care and negligence, and the following instructions given at the request of defendant. "(1) The court instructs the jury that if they believe from the evidence in the case that the deceased Harvey A. Lee was, at the time of the accident, running between two cars in motion and that he had been between said cars while they were in motion for a distance of three or four car lengths before the accident occurred, then the plaintiffs are not entitled to recover and the verdict must be for defendant. (2) The court instructs the jury that if they believe from the evidence in the case that Harvey A. Lee was at and before the time of his death an experienced railroad switchman, of average intelligence and in full possession of his mental and physical faculties, and that he had been in the employ of the defendant as a switchman for several months next before the date of the accident which resulted in his death, and that during that time he had worked in what is known as defendant's lower yard at Atchison, Kan., and at the point where said accident occurred, and that prior to the date of the said accident he had ample means and opportunity of knowing the condition of the track where said accident occurred *and at the time said accident occurred* then the plaintiffs in this case are not entitled to recover, and the verdict must be for the defendant." The words in italics in No. 2 were inserted by the court and to that extent were a modification of the original No. 2 as asked by defendant.

There was no instruction expressly defining the terms "as-

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sumption of risk" and "contributory negligence," but instructions one and two for defendant embraced all the facts that defendant relied on to establish its defense on either of those grounds, and directed a verdict for the defendant if those facts were found. The defendant, in drafting those instructions, did not say if you find those facts then the deceased was guilty of contributory negligence or he assumed the risk and therefore you will find for the defendant, but only said if you find those facts you will find for the defendant. The instructions fully covered the defendant's theory, giving it the benefit of the facts on which it relied omitting only to say what those facts, if found, would be called in legal parlance. Instruction No. 1 for defendant was stronger in defendant's favor than the circumstances of the case justified, but that is now immaterial. The instructions taken as a whole presented the case at least as favorable to the jury as defendant could ask.

6. Instruction 3 for plaintiff on the measure of damages was as follows: "If you find a verdict in favor of the plaintiffs, you will assess the damages at such sum as you find from the evidence will reasonably compensate Susan A. Lee, the widow, and Edward R. Lee, Anne E. Lee, Helen B. Lee, and Rosa M. Lee, the children, for the injury, if any, necessarily resulting to them from the loss of the life of Harvey A. Lee, assessing such damages, with reference to the pecuniary loss, if any, sustained by said widow and children of deceased; first, by fixing the same at such sum as would be equal to the probable earnings of the deceased, taking into consideration his age, business capacity, experience, and the habits, health, energy, and perseverance of the deceased during what would probably have been his lifetime if he had not been killed; second, by adding to this the value of his services in the superintendence, attention to the care of his family and education of his children, of which they have been deprived by his death, but your verdict must not be over \$10,000." That instruction is quite like that in *Jones v. Ry.*, 178 Mo. 528, 77 S. W. 890, 101 Am. St. Rep. 434, which we condemned. But, as in that case, the jury in this case did not put the construction on the instruction that it was liable to have put upon it. Under the figures given in evidence, his wages \$75 to \$85 a month, his age 29 years, and expectancy of life 36 years, his prospective earnings would have been about \$35,000 and the limit placed on the amount that might be recovered by the Kansas statute is \$10,000. The jury fixed the award at \$8,000, showing that they did not understand the instruction to mean that they were to give the full amount of the possible earnings up to the limit fixed by the Kansas statute. Here was a widow and four young children the oldest 9 years old to be compensated for their loss by the death of their husband and father, the jury, though misdirected as to the measure of damages, said by their verdict that in their judgment \$8,000 was a reasonable amount. We have no reason to think that that was not a fair and conservative esti-

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mate, and we have no right to set it aside for a mere technical error which it is evident did not mislead the jury.

7. The court refused instructions 3, 4, and 5 asked by defendants. Three and four were to the effect that if the jury should find that the deceased was an experienced switchman and had worked in this yard for several months, during which time a considerable portion of the guard rails there were unblocked and he had the means and opportunity of knowing that fact then the plaintiffs could not recover. That means that if a servant is aware of a defect in the appliance or field furnished by the master, or if he even has an opportunity of discovering it, he works at his own risk and cannot recover; it leaves out of view the question of whether or not the defect was such that the servant might reasonably hope to use it by exercising ordinary care. There was no error in refusing those instructions.

Instruction 5 was in effect that if the man was between the cars while they were going a distance of 150 or 200 feet the verdict should be for the defendant. Since the evidence showed that it was the usual custom of switchmen to go between moving trains to pull the coupling pin, and the printed rule of the company authorized them to do so when the train was moving at a slow rate, and that this train was moving at a rate railroad men called slow, the court had no right to say as a matter of law that it was negligence per se to remain between the moving cars for any specified distance, either 50 or 150 feet. The court had already gone too far in that direction by directing the jury to find for the defendant if the man remained between the cars while they were moving three or four car lengths. There was no error in refusing those instructions.

We find no reversible error in the record. The judgment is affirmed. All concur.

CHESAPEAKE BEACH RAILWAY COMPANY. Plff. in Err., v. WASHINGTON, POTOMAC, & CHESAPEAKE RAILROAD COMPANY.

(Argued October 31, November 1, 1905. Decided November 13, 1905.)

[26 Sup. Ct. Rep. 25.]

Deeds—Certainty in Description.—The vagueness of the descriptive language in a deed when considered alone is not material if, when taken in connection with the plats to which it refers, it is sufficiently certain to identify the land.

Evidence—Presumption of Continued Possession.—Possession of a railway roadbed will be presumed, in eiection, to have followed the title until the dispossession by defendant took place, where the railway tracks on the land, and the plaintiff railway company claimed under a series of deeds purporting to convey the property.

Trusts—Deed from Trustee—Effect of Recital of Foreclosure Decree on Title Conveyed.—The deed from a trustee in a mortgage conveys whatever title he had, although it recites a decree of foreclosure; since it will not be assumed from this recital that the

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trustee acted only by virtue of the power which the decree conferred.

Railroads—Conveyance of Roadbed—Effect of Grantee's Lack of Legislative Authority to Extend Its Line over the Roadbed.—The lack of any congressional authority in the successive grantees of a railway roadbed lying in the District of Columbia to extend their lines into that District could not affect their title if the original grantor had such authority.

Deeds—Necessity of Seisin.—A conveyance by a disseisee is valid in the District of Columbia.

In error to the Court of Appeals of the District of Columbia to review a judgment which affirmed a judgment of the Supreme Court of that District in favor of plaintiff in an action of ejectment to recover a railway roadbed. Affirmed.

See same case below, 23 App. D. C. 587.

The facts are stated in the opinion.

Messrs. Frederic D. McKenney and John Spalding Flannery, for plaintiff in error.

Messrs. Samuel A. Putman and Charles Poe, for defendant in error.

Mr. Justice Holmes delivered the opinion of the court:

This is an action of ejectment in which the defendant in error, the original plaintiff, recovered judgment for the land in suit in the supreme court of the District. The judgment was affirmed by the court of appeals (23 App. D. C. 587), and the case was brought here.

There was a motion to dismiss upon the ground that it affirmatively appears from the record that the matter in dispute, exclusive of costs, does not exceed the sum of \$5,000. But the reasonable inference from the record is the other way (*Harris v. Barber*, 129 U. S. 366, 32 L. Ed. 697, 9 Sup. Ct. Rep. 314), and affidavits are submitted which sustain the inference which we should draw (*Red River Cattle Co. v. Needham*, 137 U. S. 632, 34 L. Ed. 799, 11 Sup. Ct. Rep. 208).

At the trial the defendant presented no evidence, but asked the judge to direct a verdict in his favor, relying on somewhat technical criticisms of the plaintiff's case, and saving its rights by exceptions. We shall state such facts as are material.

The declaration contains nine counts, for nine parcels of land, which the plaintiff (defendant in error) contends were formerly part of the roadbed of the Southern Maryland Railroad Company, and now are part of its own. The plaintiff sought to prove its title by putting in deeds of each of these parcels made to the last-named company in 1884, and evidence of possession on the part of the same, together with subsequent deeds finally conveying the land to the plaintiff. Of course this would be sufficient if made out. It is argued that the description in the first deeds is too vague to identify the land, and the argument is fortified by the testimony of a surveyor that "the deed is not definite enough to place it on the ground." But the deed was accompanied by plats

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to which they referred, and the same surveyor testified that "the plats are as near identical [with the witness's survey of the locus] as it is possible to make them," and more to the same effect. It is evident that the former words refer to the descriptive language of the deeds alone; and that when the descriptions are taken, as they should be, in connection with the plats, there is no difficulty with the deeds.

Next it is said that there was no evidence of possession on the part of the Southern Maryland Railroad. But the same surveyor testified that he knew the old Southern Maryland Railroad tracks out there, and had known them for thirteen years; and another surveyor testified that he was employed by that company in laying out its roadbed in 1886, that he remembered the line of this right of way, that the right of way of the Southern Maryland was 66 feet wide, and that the Chesapeake Beach Railway uses the right of way of the old Southern Maryland Railroad clear to the District of Columbia line. Without going into further detail or answering every minute criticism, we are of opinion that the judge was right in leaving the question to the jury, and that the jury were warranted in finding as they did. It is said that it must appear that the possession, if any, of the Maryland company, was not abandoned. *Sabariego v. Maverick*, 124 U. S. 261, 31 L. Ed. 430, 8 Sup. Ct. Rep. 461. But in a case like the present, at least, where the tracks of the railroad were on the land, and when the plaintiff exhibits a series of deeds purporting to convey the property, the last one to itself, it is to be presumed that possession followed the title until the dispossession by the defendant took place. *Lazarus v. Phelps*, 156 U. S. 202, 204, 205, 39 L. Ed. 397, 398, 15 Sup. Ct. Rep. 271. See *Bradshaw v. Ashley*, 180 U. S. 59, 62, 66, 45 L. Ed. 423, 428, 430, 21 Sup. Ct. Rep. 297. The defendant did not hold for such a length of time, free from dispute, that abandonment to it by the plaintiff could be inferred. The suit was begun on January 13, 1902, and the possession of the defendant is not carried back beyond 1898, if so far.

The subsequent steps in the plaintiff's title are as follows: A decree of the supreme court of the District of Columbia, foreclosing a mortgage recited to have been made by the Southern Maryland Railroad, and to cover all its property then or thereafter acquired; a sale and conveyance in pursuance of the decree to one Gregory by a trustee appointed by the court; a certificate of the incorporation of the Washington & Potomac Railroad Company, reciting the foreclosure and sale of all the property of the Southern Maryland Railroad, and incorporating Gregory and others to take over the railroad; a conveyance of the property by Gregory to the new company, and a mortgage by it of the same property to the Union Trust Company of Philadelphia, both dated April 1, 1886, the date of its incorporation; a certificate of the incorporation of the plaintiff on July 24, 1901, reciting a decree of the United States circuit court for the district of Mary-

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land, which foreclosed the last-named mortgage; reciting also a sale in pursuance of the decree, and incorporating the purchaser and others to take over the railroad; and, finally, a deed to the plaintiff, by the Union Trust Company, the trustee of the mortgage last mentioned.

The main objection urged to the title is that, as the record of the last foreclosure proceedings was not put in, it does not appear that the court attempted to foreclose property in the District of Columbia, and that as the decree is recited, it must be taken that the trustee was acting only by virtue of the power which the decree conferred. But the trustee had the legal title, and purported to convey all the property which it held. The source of its title was a conveyance to it by the owner. The decree of the court only determined a foreclosure and established the right of the trustee to convey without a breach of trust. Even if it is not to be inferred that the decree was as broad as it is recited to have been (see *Muller v. Dows*, 94 U. S. 444, 24 L. Ed. 207), the deed of the Union Trust Company conveyed whatever title it had (*Williams v. Jackson*, 107 U. S. 478, 27 L. Ed. 529, 2 Sup. Ct. Rep. 814). The suggestion that the instrument must be read as limiting itself by pure implication to rights conferred by the decree, and as excluding the only source of the grantor's title, does not merit extended discussion, but it may be mentioned that there is a covenant for future assurances, in general terms, not limited to any particular source. It is observed in one of the cases cited for the defendant that "the recital in the deed cannot enlarge or control the words of the grant." *Titcomb v. Currier*, 4 Cush. 591, 592. Still less can such a recital as this be taken to eliminate the only title which the grantor held. See further *Brobst v. Brock* (*Doe ex dem. Brobst v. Brock*) 10 Wall. 519, 19 L. Ed. 1002; *Bryan v. Brasius*, 162 U. S. 415, 40 L. Ed. 1022, 16 Sup. Ct. Rep. 803.

Other purely technical attempts to upset the verdict, so far as they need remark, may be disposed of in a few words. For some unexplained reason the plaintiff, in four of its counts, after describing the land, and identifying it by the above-mentioned conveyance to the Southern Maryland Railroad, identified it further as conveyed by the commissioners of the district on a certain date,—we presume on a tax sale. It was objected that the latter allegation disclosed a title outstanding in third persons. No evidence was gone into upon the subject. Of course the meaning of the count was not to allege or admit such an outstanding title in someone else when the main allegation was that the plaintiff "was lawfully seized" at the date of the defendant's entry. We shall not spend argument upon that.

The Southern Maryland road was authorized to extend into the District of Columbia by act of Congress. Whether the later roads had authority or not would not affect the title to the land.

The land seems to have been conveyed to the defendant in error after the plaintiff in error had taken possession; but that

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is immaterial. In the District of Columbia a conveyance by a disseisee is valid. *Matthews v. Hevner*, 2 App. D. C. 349, 357; *Roberts v. Cooper*, 20 How. 467, 483, 15 L. Ed. 969, 974; *Peck v. Heurich*, 167 U. S. 624, 629, 630, 42 L. Ed. 302, 304, 305, 17 Sup. Ct. Rep. 927. A question is raised as to improvements; but it was not raised below, and is not open here.

Judgment affirmed.

SOUTHERN PACIFIC RAILROAD COMPANY, Homer S. King, Trustee, and Central Trust Company of New York, Appts., v. UNITED STATES.

(Argued January 24, 1906. Decided February 19, 1906.)

[26 Sup. Ct. Rep. 296.]

Equitable Jurisdiction—Adequate Remedy at Law.—The objection that complainant had an adequate remedy at law does not—when not made until the hearing—require the dismissal of a cause the subject-matter of which is within the jurisdiction of a court of equity, such as is presented by a bill filed on behalf of the United States, which avers that certain public lands had been erroneously patented to a railroad company, and, in addition to the relief sought by way of cancellation of the patent for lands still held by the railroad company, which was eliminated from the litigation by the decree, prays a discovery of any sales to bona fide purchasers, and a confirmation of their titles, and asks a recovery from the railroad company of the value of the lands so conveyed.

Public Lands—Railroad Land—Railroad Grants—Recovery of Value of Lands Erroneously Patented.—Irrespective of the adjustment acts of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), and March 2, 1896 (29 Stat. at L. 42, chap. 39, U. S. Comp. Stat. 1901, p. 1603), the Federal government had the right to sue a railroad company to recover the value of lands erroneously patented to such company, and sold by it to persons who dealt with it in good faith.

Appeal from the United States Circuit Court of Appeals for the Ninth Circuit to review a decree which affirmed a decree of the Circuit Court for the Southern District of California, confirming the titles of bona fide purchasers of land erroneously patented to a railroad company, and adjudging that the United States recover from the company the value of such lands. Affirmed.

See same case below, 66 C. C. A. 581, 133 Fed. 651.

Statement by MR. JUSTICE BREWER:

This was a suit begun in the circuit court of the United States for the southern district of California, by bill filed April 13, 1899. The parties named as defendants were the Southern Pacific Railroad Company, the trustees in certain mortgages, and a number of individuals sued as representatives of a class. In a general way it may be said that the bill averred that a large body of lands, some 30,000 acres and over, had been erroneously patented to the railroad company, and that por-

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tions thereof had been conveyed by it to bona fide purchasers. The relief sought was the confirmation of the titles of bona fide purchasers, the cancelation of the patents to the other lands, and the recovery from the railroad company of the value of the lands conveyed by it to bona fide purchasers, in accordance with the terms of the acts of Congress of March 3, 1887 (24 Stat. at L. 556, chap. 376, U. S. Comp. Stat. 1901, p. 1595), February 12, 1896 (29 Stat. at L. 6, chap. 18, U. S. Comp. Stat. 1901, p. 1596), March 2, 1896 (29 Stat. at L. 42, chap. 39, U. S. Comp. Stat. 1901, p. 1603), providing for the adjustment of railroad land grants. After answers by the railroad company and some of the individual defendants, proofs were taken, and upon a hearing a decree was entered which, in separate paragraphs, specifically confirmed the titles to the several tracts held by bona fide purchasers, and adjudged that the United States recover from the railroad company the value of those lands, a sum amounting in the aggregate to \$33,596.92. 117 Fed. 544. This decree was affirmed by the court of appeals (66 C. C. A. 581, 133 Fed. 651), from whose decision the railroad company and the trustees appealed to this court.

Mr. Maxwell Evarts for appellants.

Mr. Joseph H. Call for appellee.

Mr. Justice BREWER delivered the opinion of the court:

The appellants challenge the decree on two grounds: First, that a suit in equity cannot be maintained because there is a plain, adequate, and complete remedy at law; and, second, that the United States cannot by legislation create an obligation of the railroad company for the value of the land patented to and conveyed by it to bona fide purchasers.

No objection was made to the jurisdiction of the court as a court of equity by any pleading or before the hearing. It is undoubtedly true that a suit in equity cannot be maintained when there is a plain, adequate, and complete remedy at law. Such is the mandate of the Revised Statutes (Rev. Stat. § 723, U. S. Comp. Stat. 1901, p. 583) as well as the general rule in equity. *Lewis v. Cocks*, 23 Wall. 466, 23 L. Ed. 70; *Killian v. Ebbinghaus*, 110 U. S. 568, 28 L. Ed. 246, 4 Sup. Ct. Rep. 232; *Litchfield v. Ballou*, 114 U. S. 190, 29 L. Ed. 132, 5 Sup. Ct. Rep. 820; *Allen v. Pullman's Palace Car Co.* 139 U. S. 658, 35 L. Ed. 303, 11 Sup. Ct. Rep. 682. It is also true that this objection need not always be raised by some pleading, but may be presented on the hearing even in the appellate court; and, if not suggested by counsel, may be enforced by the court on its own motion. See authorities just cited. But, on the other hand, it is equally true that where the objection that the plaintiff has an adequate remedy at law is not made until the hearing, and the subject-matter is of a class over which a court of equity has jurisdiction, the court is not necessarily obliged to entertain it, even though, if taken *in limine*, it might have been worthy of

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attention. *Wylie v. Coxe*, 15 How. 415, 420, 14 L. Ed. 753, 755; *Reynes v. Dumont*, 130 U. S. 354, 395, 32 L. Ed. 934, 945, 9 Sup. Ct. Rep. 486; *Kilbourn v. Sunderland*, 130 U. S. 505, 514, 32 L. Ed. 1005, 1008, 9 Sup. Ct. Rep. 954; *Brown, B. & Co. v. Lake Superior Iron Co.*, 134 U. S. 530, 33 L. Ed. 1021, 10 Sup. Ct. Rep. 604; *Insley v. United States*, 150 U. S. 512, 515, 37 L. Ed. 1163, 1165, 14 Sup. Ct. Rep. 158; *Perego v. Dodge*, 163 U. S. 160, 164, 41 L. Ed. 113, 116, 16 Sup. Ct. Rep. 97; 1 Dan. Ch. Pl. & Pr. 4th Ed. p. 555. It is necessary, therefore, to notice more in detail the allegations in the bill. That sets forth land grants to the Atlantic & Pacific Railroad Company, the Southern Pacific Railroad Company, and the Texas Pacific Railroad Company. It shows the acceptance by the Atlantic & Pacific Company of its grant, the filing of its maps of definite location, a failure to complete its road within the state of California, an act of Congress forfeiting the lands along the line of said road within that state, a claim of the Southern Pacific Company to some of those lands, the erroneous patenting of them to that company, a demand for a reconveyance, and the acts of Congress in respect to the adjustment of railroad land grants. The bill further alleges that more than one thousand persons, among whom are the individual defendants named in the bill, who are sued as representatives of the class, had purchased by immediate or mesne conveyances from the Southern Pacific Company certain of those lands specifically described in Exhibit A; that all these purchasers claim an interest in the lands, but the nature and extent of their claims are unknown; that a prior suit, brought to vacate and annul patents, included those lands, and had been dismissed as to them without prejudice, upon the claim of the Southern Pacific Company that it had conveyed them to bona fide purchasers. In an amendment to the bill is a prayer (in order to secure an accounting with the railroad company) for a statement of the sales of these tracts, with the names of the purchasers, dates of sales, purchase prices, and amounts paid. The bill also alleges that there is a dispute between the railroad company and the persons purchasing or contracting with it, in respect to the validity of the titles conveyed, or attempted to be conveyed by the company; avers that the United States has no desire to question the title of bona fide purchasers, but, on the contrary, seeks to have such title confirmed. It prays for a determination of the tracts sold to bona fide purchasers, to the end that the titles thereto may be confirmed, for a decree vacating and annulling the patents for any lands not so sold, and quieting the title of the United States thereto, and that the railroad company be required to account to the United States for the value of the lands sold to bona fide purchasers, or such sum as had been received by the company from those sales, not exceeding \$1.25 per acre, and for such other and further relief as is just and equitable.

It is contended by the railroad company that this is merely

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an action in assumpsit to recover the amount claimed to be due for the lands patented to and sold by it to bona fide purchasers. But this ignores the full scope of the suit. The bill asked cancellation of the patents and a quieting of the title of the plaintiff to those lands still held by the company, or not sold to bona fide purchasers. It prayed a discovery of all sales and conveyances, with the dates of the sales and the amounts received thereon. It also sought a confirmation specifically of the titles of bona fide purchasers, and finally an accounting with and recovery from the company. A cancellation of patents and a quieting of title is obtainable in equity. *Hughes v. United States*, 4 Wall. 232, 18 L. Ed. 303; *Moore v. Robbins*, 96 U. S. 530, 24 L. Ed. 848; *Mullan v. United States*, 118 U. S. 271, 30 L. Ed. 170, 6 Sup. Ct. Rep. 1041; *Williams v. United States*, 138 U. S. 514, 34 L. Ed. 1026, 11 Sup. Ct. Rep. 457; *Germania Iron Co. v. United States*, 165 U. S. 379, 41 L. Ed. 754, 17 Sup. Ct. Rep. 337. It is true no decree was entered for the cancellation of any patents, and that matter was thus eliminated from the litigation. But the confirmation of the title of specific tracts to bona fide purchasers, which did pass into decree is equally within the jurisdiction of a court of equity. While discovery is now seldom the object of a suit in equity, and doubtless would not uphold such a suit when the full information was obtainable by proceedings at law, yet it was a well-recognized ground of equity jurisdiction (*Kennedy v. Creswell*, 101 U. S. 641, 645, 25 L. Ed. 1075, 1076; 1 Story, Eq. Jur. 11th Ed., § 689 and following; 1 Pom. Eq. Jur. § 193 and cases cited in notes), and whether in any given case a court of equity would be justified in acting is a question for its determination. It is unnecessary to determine whether, if properly challenged, the allegations in this bill were sufficient. Probably not. *United States v. Bitter Root Development Co.* 201 U. S. —, post, 318, 26 Sup. Ct. Rep. 318. It is enough that discovery was sought, that discovery is not obtainable in an action at law, but only in a suit in equity. It may be that in order to support a recovery from the railroad company it was not necessary that there be a formal confirmation of the titles of the purchasers from it, or that the purchasers be made parties defendant, yet it was competent for the court, under the pleadings, to enter such a decree, and the government was justified in asking for it. Indeed, such action seems to have been contemplated by the statute, for in the 2d section of the act of March 2, 1896, it is provided: "An adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, per-

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son, or association of persons for whose benefit the certification was made, for the value of the land as hereinbefore provided.”

If only an action at law had been brought to recover the value of these lands from the railroad company, unless the verdict had been for the full amount claimed, \$1.25 an acre, or unless there had been specific findings of fact showing the particular tracts on account of which recovery was given, it would be open to grave doubt whether any titles would be confirmed even by inference; and a cloud would be left hanging over the titles of each of these purchasers. Clearly the case here presented was within the jurisdiction of a court of equity; and if there was any objection to that jurisdiction it should have been made *in limine*, and not after pleadings had been perfected and proofs taken.

Passing to the other question, it is charged in the bill that these statutes constituted a valid contract between the government and the railroad company. Now whether that be strictly true we need not stop to consider. It is enough that upon the facts the government was entitled to recover from the company. Erroneously and by mistake the officers of the government executed patents to the railroad company conveying the legal title to the lands. The railroad company accepted such title and subsequently conveyed the lands to parties who dealt with it in good faith. When by mistake a tract of land is erroneously conveyed, so that the vendee has obtained a title which does not belong to him, and before the mistake is discovered the vendee conveys to a third party purchasing in good faith, the original owner is not limited to a suit to cancel the conveyances and re-establish in himself the title, but he may recover of his vendee the value of the land up to at least the sum received on the sale, and thus confirm the title of the innocent purchaser. The conveyance to the innocent purchaser is equivalent to a conversion of personal property. Irrespective, therefore, of the act of Congress, the government had the right, when it found that these lands had been erroneously patented to the railroad company, and by it sold to persons who dealt with it in good faith, to sue the railroad company, and recover the value of the lands so wrongfully received and subsequently conveyed. The acts of Congress really inure to the benefit of the railroad company, and restrict the right of the government, for they provide that the recovery shall in no case be more than the minimum government price. In other words, the government asks only its minimum price for public land, no matter what the value of the tracts or the amounts received by the company may be.

It may be noticed in this connection that in no case was the value of any land sold fixed in the decree above the sum received by the company therefor, and that in many instances that sum exceeded the minimum price of \$1.25 per acre. It may also be noticed that by stipulation it appears that within the

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indemnity limits there still remains a large body of lands from which the railroad company can select lands in lieu of those involved in the suit.

We see nothing in this decision of which the railroad company can complain. The decree of the Circuit Court of Appeals is affirmed.

RAINEY v. RED RIVER, T. & S. RY. CO. *et al.*

(Supreme Court of Texas, Nov. 9, 1905.)

[89 S. W. Rep. 768.]

Railroads—Nuisance—Legislative Authorization.*—The legislature may legalize a nuisance committed by a railroad, provided the damages be fully compensated by the payment of money.

Same—Machine Shops.*—Const. art. 1, § 17, provides that no person's property shall be taken, damaged, or destroyed for, or applied to, a public use, without adequate compensation being made. Rev. Stat. 1895, art. 4445, authorizes a railroad which is unable to agree with the owner for the purchase of real estate for its depots, machine and repair shops, or right of way, to condemn such real estate. Article 4424 provides that a railroad shall have the right to cause the survey for its proposed route to be made in such manner as may be necessary to the selection of the most advantageous route. Held, that while a railroad is empowered absolutely to select such right of way as it deems most advantageous to its enterprise, yet, in selecting land for its machine and repair shops, it cannot act arbitrarily and without reference to damage to property in the vicinity or to the discomfort of persons there residing.

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by S. D. Rainey against the Red River, Texas & Southern Railway Company and others. There was a judgment of the Court of Civil Appeals (80 S. W. 95) affirming a judgment of dismissal, and plaintiff brings error. Reversed.

Ross & McLean, for plaintiff in error.

West, Chapman & West and *Theodore Mack*, for defendants in error.

RAINEY, C. J. In their opinion, the Court of Civil Appeals

*See generally, foot-note appended to *Walther v. Chicago & W. I. R. Co.* (Ill.), 17 R. R. R. 456, 40 Am. & Eng. R. Cas., N. S., 456; *Atchison, etc., Ry. Co. v. Armstrong* (Kan.), 17 R. R. R. 415, 40 Am. & Eng. R. Cas., N. S., 415; *Johnson v. Charleston & W. C. Ry.* (S. Car.), 17 R. R. R. 447, 40 Am. & Eng. R. Cas., N. S., 447; *Smith v. St. Paul, etc., Ry. Co.* (Wash.), 17 R. R. R. 114, 40 Am. & Eng. R. Cas., N. S., 114; *Davis v. Charleston & W. C. Ry. Co.* (S. Car.), 17 R. R. R. 102, 40 Am. & Eng. R. Cas., N. S., 102; *Connors v. Yazoo & M. V. R. Co.* (Miss.), 17 R. R. R. 455, 40 Am. & Eng. R. Cas., N. S., 455; *Perrine v. Pennsylvania R. Co.* (N. J.), 17 R. R. R. 450, 40 Am. & Eng. R. Cas., N. S., 450; *Foust v. Pennsylvania R. Co.* (Pa.), 17 R. R. R. 156, 40 Am. & Eng. R. Cas., N. S., 156.

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have made a very full statement of this case, which we adopt and copy:

“Appellant instituted suit to enjoin and restrain the appellees, railway companies, from maintaining and operating their terminal and switch yards, roundhouse, engine house, machine shops, water tank, and coal bins, and from using their tracks for switching trains and cars, distributing cars, making up trains, coaling, watering, and firing steam engines and locomotives, and from repairing and storing engines in said roundhouse and engine house, within certain defined territory in close proximity to his residence. He alleged: That the lot, upon which was situated his residence, was highly and well improved, having thereon a commodious two-story dwelling house, a stable, shade trees, shrubbery, fruit trees, vines, and flowers, with the appurtenances, and that in the said dwelling house, with the appurtenances, the said plaintiff and his family dwelt. That said lot and dwelling house, with the appurtenances, are now and have been for a long time, to wit, 17 years, occupied and used by him and his family. That said lot and dwelling house, but for the grievances, wrongs, and injuries complained of, were suitable for a home for himself and family, and would be of the reasonable value of not less than \$15,000, and that, prior to the grievances and acts of annoyance complained of, said lot and dwelling house, with the appurtenances, were comfortable and convenient as a residence and home for himself and family, and were by them used and enjoyed, unmolested and free from annoyances. That the defendants have built, constructed, and placed, and are now maintaining and using continuously, a number of railroad tracks, to wit, more than five in number, north, northeast, and northwest of and near the said lot and dwelling house. That said railway tracks are placed within 300 feet of said lot and dwelling house. That defendants have constructed and erected, and are now maintaining and using continuously, near and within 300 feet of said lot and dwelling house, a large water tank for supplying water for their engines. That defendants have constructed and built, and are now maintaining and using continuously, near and within 300 feet of said lot and dwelling house, large coal bins, together with derricks for supplying coal for their engines. That defendants have constructed and built and erected, and are now maintaining and using continuously, near and within 300 feet of plaintiff's said lot and dwelling house, a large roundhouse and engine house for storing their engines, and that defendants have erected and built, and are now maintaining and using continuously, near and within 300 feet of said lot and residence, large railroad machine and repair shops. That the said defendants have placed and used, and are now maintaining and using continuously, near and within 300 feet of plaintiff's said lot and dwelling house, their terminal and switch yards. That the said railroad tracks, water tanks, coal bins, derricks, roundhouse, machine and repair shops, and terminal

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and switch yards are upon and cover certain territory, the metes and bounds of which are fully set forth. That in maintaining and using the said machine and repair shops the defendants continuously make loud and deafening noises, which interrupt and disturb plaintiff in the use and enjoyment of his said home. That, in permitting cars laden with live stock to stand on said tracks, stench, noises, smoke, steam, and dirt are caused, which annoy and injure plaintiff in the use and enjoyment of his said lot and residence. That a large number of locomotives and steam engines are habitually housed and their fires made in said engine house, and are coaled, watered, repaired, and otherwise used on said tracks and in said repair shops. That defendants, and each of them, in watering, coaling, firing, switching, operating, and otherwise using the locomotives and steam engines, and distributing cars, making up trains, and steam engines cause constantly and continuously loud and deafening noises, by ringing the engine bells, blowing engine whistles, blowing off steam, and propelling engines and cars. That said steam engines, locomotives, and cars emit clouds of smoke, dust, cinders, sparks, noxious vapors, and steam from the engines, with great force and noise, jarring and shocking plaintiff's said dwelling house. That the sparks, cinders, soot, smoke, and noxious vapors from said engines have been, and are still, continuously blown and thrown in and upon plaintiff's said premises, and against, and into his said dwelling house and stable, on his furniture, furnishings, and clothing. That the stench, smoke, dirt, noise, jars, and shocks, caused as aforesaid, are so great that plaintiff and his family are continuously incommode, inconvenienced, annoyed, and harassed in the possession, use, occupation, and enjoyment of said dwelling house, with the appurtenances. That the noise, jars, and shocks are such that a conversation cannot be carried on in plaintiff's said premises, and that he and his family cannot sleep at night without constantly and continuously being awakened, annoyed, harassed, and shocked. That the disagreeable and offensive odors from cars laden with live stock added to the smoke, noise, cinders, and sparks render plaintiff's said property, not only uncomfortable and disagreeable, but entirely undesirable as a home and residence. That on account of these things, he has been forced to abandon a portion of his dwelling house, and that if defendants, or either of them, are permitted to continue the use of said tracks, grounds, and yards in the manner shown, his property will have to be abandoned and will be lost. That the place described is in a densely populated part of the city of Ft. Worth, and a great many citizens, to wit, more than 50, are annoyed and inconvenienced in like manner as plaintiff. No judgment for damages was asked, but an injunction alone sought as before shown. The defendants pleaded that they had legally acquired the ground upon which were situated their terminals in the city of Ft. Worth; that they operated their roads with all modern appliances, with due regard

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to the accommodation and service of the general public, both as to freight and passenger traffic; that they owned in fee simple their right of way, sidings, switches, etc., and that their water tanks, roundhouses, etc., were all necessary in the maintenance and operation of the said railroads, and in the transaction of their business along and over their line of road, as constructed and maintained in the corporate limits in the city of Ft. Worth; that they had fully complied with all the laws of the state and the ordinances of the city.

"A single issue was submitted to the jury in the following charge: 'If you find and believe from the evidence that the defendants are maintaining and operating a switchyard and roundhouse, and are watering, coaling, and firing their engines at their watering tanks and coal bins within the territory described in plaintiff's petition, and that the operation and maintenance of said switchyard and roundhouse, and such watering, coaling, and operating their engines, causes loud noises to be made, and creates smoke, dust, and cinders, and you further believe from the evidence that this causes hurt, inconvenience, or damage to plaintiff's property—that is, if you believe that, by reason thereof, plaintiff's property is rendered less valuable for the purposes for which it is adapted and used, and materially interferes with the comfortable enjoyment thereof by the plaintiff and his family—and you further believe that said damage and inconvenience is such as is not suffered by the community at large, then it will be your duty to return a verdict for the plaintiff.' The jury returned a general verdict in favor of the plaintiff, whereupon he moved the court in writing to enter judgment in his favor according to the prayer of his petition. This the court declined to do, or to enter any judgment whatever in his favor, but entered a decree dismissing the bill. Much evidence was introduced upon the trial going to support the verdict of the jury upon the issue submitted. It was agreed between the parties that appellees had acquired real estate occupied by them by condemnation or purchase, and further that the railroad yards are constructed as they should be; that the switchyards are operated as they should be, and with as little noise as they can be, and that there is no way that these yards could be constructed at that place other than they are constructed which would lessen the annoyance to anybody; and that appellees' road is kept in good repair, and that their engines and rolling stock are kept in good repair, and that they use the very best class of coal to be had. In short, it is undisputed that appellees were guilty of no negligence in the manner of maintaining and operating their various terminal facilities. But the sole complaint is that, being maintained as they are at this particular place, they constitute a nuisance as to appellant, which he is entitled to abate as such."

It is clear that if the acts charged against the defendant had been committed by an individual, or by a corporation in pursuit

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of a private business, they would have created a nuisance, which was subject to be enjoined. But a railroad company is organized for the performance of duties to the public, as well as for private emolument; and when such is the case, the Legislature may legalize the nuisance, provided always the damages be fully compensated by the payment of money. The question then is, does our law give a railroad company the power to select arbitrarily the location of its machine and repair shops, and necessary structures of a like character, without reference to the damage to property in its vicinity, or to the discomfort of persons there residing? Section 17 of article 1 of our Constitution provides: "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person; and, when taken, except for the use of the state, such compensation shall be first made or secured by a deposit of money," etc. Article 4445 of the Revised Statutes of 1895 also provides that: "If any railroad corporation shall at any time be unable to agree with the owner for the purchase of any real estate or the material thereon required for the purposes of its incorporation or the transaction of its business, for its depots, station buildings, machine and repair shops, or for the right of way, or any other lawful purpose connected with or necessary to the building, operating or running its road, such corporation may acquire such property in the manner provided in this chapter." The manner provided in the chapter is by condemnation.

That a railroad company should have the right to designate its right of way and to condemn property therefor, as well as to damage other property not taken, would seem almost a necessity. Article 4424 of the Revised Statutes reads as follows: "Every railroad corporation shall have the right to cause such examination and survey for its proposed railroad to be made as may be necessary to the selection of the most advantageous route, and for such purpose may enter upon the lands or waters of any person or corporation, but subject to responsibility for all damage that may be occasioned thereby." We think it a reasonable implication from this provision, that it was contemplated that the company was empowered absolutely to select such right of way it should deem "most advantageous" to its enterprise. We are of the opinion, however, that the case of machine and repair shops, and the like stand upon a different footing. From the statute first quoted above, it is seen that they have the express power to condemn land for such structures; and of necessity they must make the selection of the location. But, in our opinion, it does not follow, that the Legislature intended to empower them to act arbitrarily and without regard to any injury that might be inflicted upon others. In reference to "machine and repair shops," there is no express provision, as in case of a right of way, that they make the selection for such purposes of "the most advantageous" location. The proposition

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that, before it can be held that the Legislature intended to legalize a nuisance, it must appear that the statute either pointed out the place at which the objectionable structure and works were to be built and operated or left to the corporation the power to make arbitrarily the selection, is illustrated by two leading cases from the House of Lords, which are sharply in contrast upon the question. In the case of *Metropolitan Asylum District Managers v. Hill and Others*, 6 App. Cas. 193, it appears that an act of Parliament authorized the establishment of asylums for the care of sick and infirm and poor and created corporations for the purpose, empowering them to purchase lands and erect buildings for carrying out the objects of the act, and that the Metropolitan Asylum District Managers, having been created a corporation under the act, purchased land and erected a hospital for smallpox and other infectious diseases, which were found to be a nuisance to the complainants, who were property holders in the vicinity of the hospital so established. It was held that, although the act authorized the establishment of the hospital, it did not empower the corporation to create a nuisance, to the detriment of neighboring proprietors. The case of *London, Brighton & South Coast Railway Company v. Truman and Others*, 11 App. Cas. 45, was an action to enjoin the defendant railway company from maintaining a cattle dock and yard in connection with its business as a carrier of cattle. The corporation was created in 1837 by private act. In the section or sections of the act which defined the right of way, no mention was made of the use of the land to be condemned or purchased for the purpose for cattle pens. But section 82 of the act contained this provision: "It shall be lawful for the said company, and they are hereby empowered to contract with any person or corporation (who shall be willing to sell the same) for the purchase of any lands, not exceeding, in the whole, fifty statute acres, in addition to the lands hereinbefore authorized to be taken, in such places as shall be deemed eligible, for the purpose of making and providing additional stations, yards, wharfs, waiting, loading and unloading places, warehouses, and other buildings and conveniences, for receiving, depositing, loading, or keeping any cattle or any goods, articles, matters, or things, conveyed or intended to be conveyed upon the said railway, or for making convenient roads or ways thereto, or for any other purposes whatsoever connected with the undertaking by this act authorized, which the said company shall judge requisite." The court held that the company by virtue of the act, had the right to establish its cattle depots at such places as it might select, provided they were carefully established and operated; and that persons damaged thereby must bear the loss. The words, "in such places as may be deemed eligible," clearly show that the company was given the absolute right of selection, and therefore the right to create a nuisance, in so far as the cattle depots were a necessary nuisance, in such

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places as might be deemed most eligible. This it seems to us is the main feature which distinguishes the case from that of *Metropolitan Asylum District Managers v. Hill*. In that case, the corporations were given the right to establish hospitals, but were not given the absolute right to choose their location; in the case of *Railway Company v. Truman*, the company was expressly authorized to buy land for cattle depots and to make their own selection of the places at which they were to be established, without reference to the rights of neighboring proprietors.

The present case, in our opinion, falls within the rule followed in that of *Metropolitan Asylum District Managers v. Hill*. In his opinion in the *Truman Case*, Lord Blackburn says: "It is clear that the burden lies on those who seek to establish that the Legislature intended to take away the private rights of individuals, to show that by express words, or by necessary implication, such an intention appears." Railroads can only be chartered in this state under the general laws. As we have seen, our statute gives them the power to acquire land for "machine and repair shops." It is necessarily implied, that they may establish and operate such shops. Since in the nature of things, a general law for the incorporation of railroad companies could not point out the particular spots upon which the shops were to be located, it follows that they must have authority to choose the locations. But it does not follow that it was the intention of the Legislature to empower them to make the selection arbitrarily; that is to say, without reference to the rights of persons who might own property in close proximity to such locations. Did the Legislature intend to authorize a railroad running in the city of Austin to establish and operate structures of the character in question, so near to the capitol as to render it unfit for the purposes for which it was constructed? The same question may be asked as to the courthouse of the county or the public school buildings and churches of the city. We should be loath to answer this question in the affirmative. Yet if the statute empowers a railroad company to establish its shops in such proximity to a private dwelling as to depreciate its value and to bring great discomfort upon the occupants, no sufficient reason suggests itself to our minds why the same might not be done as to the Capitol, the courthouse, and other public structures. In the leading and often cited case of *Baltimore & Potomac Railway Company v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, 27 L. Ed. 739, a recovery of damages by the church against the railroad company was sustained for the maintenance of its shops in close proximity to the church, and the shops, as operated, were declared to be a nuisance. In course of the opinion, it is said that it was subject to be enjoined, though the question of an injunction was not involved in the case. The court there conceded all the rights of the company growing out of statutory authority which can be

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claimed for the defendant company in the present case. We are aware that there is a conflict of authority upon the question. Among the recent cases in support of our opinion may be cited *Ridge v. Penn. Railroad Company*, 58 N. J. Eq. 176, 43 Atl. 275, *Terminal Company v. Jacobs*, 109 Tenn. 741, 72 S. W. 954, 61 L. R. A. 188, and *Willis v. Bridge Company*, 104 Ky. 190, 46 S. W. 488. In *Dolan v. Railway Company*, 118 Wis. 362, 95 N. W. 385, and *Austin v. Terminal Railway Company*, 108 Ga. 686, 34 S. E. 852, 47 L. R. A. 755, the contrary doctrine is held, the latter by a divided court.

For the reasons given we are of the opinion, that the judgment ought to be reversed and the cause remanded.

Since the case is to go back for a new trial, we think it not improper to suggest that, because a nuisance of the character of that in question is not legalized by the statute, it does not follow that it can, in every case, be enjoined. The Constitution gives the injured party an absolute right to pecuniary compensation. Machine and repair shops are necessary to the operation of any extended line of railroad, and they can hardly be constructed and operated without creating a nuisance or becoming a nuisance in the course of subsequent events. So that, in any case, when the company is enabled to show a reasonable necessity for the location at the particular point, or that no other eligible place can be found where a similar injury would not be inflicted upon another person or persons, an injunction should be denied, and the party remitted to his action for damages. So if the injury be small and capable of being estimated in money, and a money payment is an adequate compensation and the injunction would operate oppressively to the defendant, then it may be that it would be proper to refuse to enjoin. See remarks of Lord Justice A. L. Smith, in *Shelfer v. Electric Light Company* [1895] 1 Chan. 321-323. However, we would not be understood as laying down any fixed rules upon this point, but as merely throwing out some suggestions, which may be useful in the final determination of the rights of the parties.

The judgment is reversed, and the cause remanded.

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(Supreme Court of Texas, Feb. 5, 1906.)

[90 S. W. Rep. 860.]

Boundaries—Construction of Deed—Calls for Right of Way.—The right of way of a railroad is not a public highway, within the rule of construction of deeds to lands bounded by a public highway, in such sense as to make a deed calling for a right of way as a boundary convey the owner's interest in the land between the boundary of the right of way and the railroad track.

Same—Superiority of Calls—Boundary Calls.—A call of a deed for a railroad right of way will, if unexplained, be treated as a call for

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another tract of land, and will control conflicting calls for distance.

Evidence—Parol Evidence—Boundaries—Explanation of Conflict.—A conflict between a call of a deed for distance and a call for a railroad right of way may be explained so as to show the real intention of the parties, and the deed may be enforced accordingly.

Trespass—Joint Tort Feasors—Participation in Wrongful Act.—Where a railroad gives a city permission to take water from wells on the land of a private person, and enters into a contract with the city requiring the city to indemnify it against all damages which may accrue by reason of the use of the wells by the city, the owner of the land is entitled to recover from the railroad any damages which he shows himself entitled to recover for the appropriation of the water by the city.

Error from Court of Civil Appeals of Second Supreme Judicial District.

Action by John Couch against the Texas & Pacific Railway Company and another. There was a judgment of the Court of Civil Appeals affirming a judgment for defendants (87 S. W. 847), and plaintiff brings error. Reversed.

Bowyer & Tillett, for plaintiff in error.

H. C. Shropshire and *Otis Bowyer*, for defendants in error.

BROWN, J. We adopt the statement of the Court of Civil Appeals as follows:

"This suit was brought by John Couch against the Texas & Pacific Railway Company and the city of Baird to recover damages in the sum of \$15,000 for the alleged conversion of water from a well averred to be on appellant's premises. Upon hearing the evidence the court peremptorily instructed a verdict for appellees. Couch has appealed from the judgment entered on the verdict. These are the facts: The right of way of the railway company runs through the N. W. $\frac{1}{4}$ of section 90, B. B. B. & C. R. R. land on practically a straight line. The company constructed its road over the land in 1879 and 1880, when it was public school land, and it had the right of way thereover by virtue of article 4167, Rev. St. 1879, for its road. The quarter section in controversy was first filed on by F. D. Merchant, plaintiff's assignor, on the 3d of January, 1881, and was patented to plaintiff, as assignee, on the 7th of February, 1902. The well in controversy was dug by the railway company on the quarter section, and is located on the north side of its railroad track and on its right of way. On the 6th day of March, 1889, Couch sold and conveyed to Norton and McGown the following described portion of said land: A portion of N. W. $\frac{1}{4}$ of section ninety (90), B. B. B. & C. R. R. Co., about $2\frac{1}{2}$ miles west of Baird, commencing at N. E. corner of the N. W. $\frac{1}{4}$ of said section ninety (90), stake and stone mound, from which a p. o. 10 brs. S. $62\frac{1}{2}$ W. 217 vrs., marked 'R'; do. 10 brs. N. 77 W. $38\frac{1}{2}$ vrs., marked 'X'; thence west 950 vrs., to S. E. corner No. eighty (80), B. B. B. & C. Ry. Co. land, stone and mound for corner, from which a black jack 8 sec. brs. S. 28 E. 21 vrs., mk'd 'N. W.,' 90 a p. o. 19 brs. N.

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83 W., 80 vrs. mk'd 'RR'; thence south, about 190 vrs., to right of way of the Texas & Pacific Railway; thence east, with said T. & P. Ry. right of way, about 950 vrs., to corner, thence north, about 110 vrs., to stake and stone mound, from which a p. o. 10 sec. brs. S. $62\frac{1}{2}$ W. 217 vrs., mk'd 'R,' p. o. 10 sec. brs. N. 77 W. $38\frac{1}{2}$ vrs., marked 'X,' to place of beginning—containing forty (40) acres more or less. The county surveyor of Callahan county testified as follows: 'Beginning at the northwest corner of section 90, and running south 190 varas, will carry you to the Texas & Pacific Railroad track. This corresponds with the field notes in the plaintiff's patent to the land. * * * On the east side, between the two quarters, I went to the center of the track. This, I think, was 110 varas. The deed called for 40 acres, more or less. Upon making the calculation I find that the field notes figure out only 25.25 acres of land.' "

The right of way of a railroad is not a public highway, in the sense of a public road or street, and the rule of construction which applies to a deed for land bounded by a public highway does not apply in this case so as to make the deed convey land not included in its terms. At the time the deed from Couch to Norton and McGown was made Couch owned the land on both sides of the railroad, and after the sale the entire right of way remained in connection with his land south of the railroad. Under this state of facts there is no ground for a presumption that Couch intended to convey that portion which lay between the line described in the deed and the railroad track.

There is a conflict between the call in the deed for the distance 190 varas and the call for the right of way. Unexplained, the call for the right of way must be treated as if it had been a call for another tract of land, and will control the call for distance. Upon the face of the deed the land conveyed extends only to the north line of the right of way, but the conflict between the call for distance and the call for the right of way may be explained so as to show the real intention of the parties, and, if it shall appear that it was intended to convey the land to the railroad track, then the call for distance should be enforced; otherwise, the deed should be limited to the north line of the right of way. *Wyatt v. Foster*, 79 Tex. 420, 15 S. W. 679.

The railroad company insists that there is no evidence to charge it with participation in the appropriation of the water by the city of Baird, but we find in the record a contract between the railroad company and the city whereby the railroad company gives the city permission to take the water, requiring the city to indemnify it against all damages which might accrue by reason of the use of the wells by the city, also required said city to fence the wells so as to guard against damages to stock that might congregate around them, and to indemnify the railroad company against all damages arising from such cause. Under these facts we think that there was a cause of action shown

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against the railroad if the plaintiff shows himself entitled to recover for the appropriation of the water by the city.

The district court erred in instructing the jury to find a verdict for the defendants, and the Court of Civil Appeals erred in affirming the judgment of the district court, for which errors the judgments are reversed, and the cause remanded.

LITTLEJOHN v. CHICAGO, E. & L. S. Ry. Co.

(Supreme Court of Illinois, Feb. 21, 1905.)

[76 N. E. Rep. 840.]

Railroads—Interest in Lands—Right of Way Agreements.*—An agreement by a property owner to convey land to a railroad, provided it shall construct its road through a certain village within a year from the date of the agreement, and promising to deliver a deed when the road is built and in operation, prior to which time the railroad may enter upon the premises for the purpose of constructing and operating its road, is a mere license to the railroad to enter upon the land to construct its road and operate its trains, and gives the railroad a mere right to the possession of the land, and confers on it no title.

Deeds—Construction—Exceptions.—In order to except property included in the description of a deed from the operation of the grant, the intention to so except it must be expressed in clear and certain terms.

Railroads—Grant of Right of Way—Exceptions.—Where a property owner authorized a railroad to enter upon a strip of land and construct its road thereon, and promised to give a deed if the road should be constructed and in operation within a certain time, a subsequent deed, executed by the property owner, conveying the land on which the strip promised to the railroad was located, which provided that the conveyance was made subject to the agreement with the railroad, and included a reversionary right to the portion of the land used by the railroad in case it should give up its rights, did not except from the grant the strip promised to the railroad, or recognize the legal title to be in it.

Same—License—Termination.—A property owner agreed with a railroad to sell it a strip of land and to deliver a deed thereto, if the railroad should be constructed and in operation through a certain village within a year from the date thereof, and authorized the railroad in the meantime to enter on the premises for the purpose of constructing and operating its road. The railroad did not take possession of the strip within the time limited by the agreement, but afterwards took possession and built its road with the consent of the property owner, but did not comply with the provision of the

*For the authorities in this series on the subject of the forfeiture of railroad right of way for failure to comply with terms of grant, see foot-note appended to *Krueger v. St. Louis, etc., R. Co. (Mo.)*, 14 R. R. R. 459, 37 Am. & Eng. R. Cas., N. S., 459; *Lucas v. New York, etc., R. Co. (C. C. A.)*, 14 R. R. R. 85, 37 Am. & Eng. R. Cas., N. S., 85.

For the authorities in this series on the subject of the title acquired, by deed or condemnation proceedings, in land conveyed or condemned for a railroad right of way, see foot-note appended to *Walker v. Illinois Cent. R. Co. (Ill.)*, 18 R. R. R. 439, 41 Am. & Eng. R. Cas., N. S., 439.

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agreement requiring it to construct and operate a railroad through the village. Held that, the railroad not having performed the agreement within the time limited and having wholly failed to perform one condition of the agreement, the owner of the land or her successors in title could revoke the license under which the railroad took possession and terminate any right in the railroad to the possession of the land.

Same—Revocation of License—Waiver of Right.—The failure of a landowner, who had licensed a railroad to build its road over her land under certain conditions and within a certain time, to declare a forfeiture of the license contract at the expiration of the time fixed for performance, was not a waiver of the right of herself or of her grantee to insist upon a performance of the conditions at some future time, and in lieu of such performance to declare a forfeiture for nonperformance.

Same—Conditions of Grant—Nature.—Where a property owner agreed to convey land to a railroad, provided it should construct and operate its road through a certain village within a certain time, the conditions of the conveyance were conditions precedent, and the railroad could not contend that it was seised of an estate upon conditions subsequent.

Appeal from Superior Court, Cook County; Robert W. Wright, Judge.

Action by Wiley J. Littlejohn against the Chicago, Evanston & Lake Superior Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

The appellant, Wiley J. Littlejohn, on June 16, 1903, brought an action of ejectment in the superior court of Cook county against Chicago, Evanston & Lake Superior Railway Company, Chicago, Milwaukee & St. Paul Railway Company, and Chicago & Milwaukee Electric Railway Company, appellees, to recover a strip of land 163.7 feet in width at the north end thereof and 111.2 feet in width at the south end, and about 324 feet in length, extending across the N. $\frac{1}{2}$ of lot 30 (except the north 256 feet thereof), in Baxter's subdivision of the south section of the Ouilmette reservation, in township 42 N., range 13 E. of the third principal meridian, in Cook county. A jury was waived, and the court, after hearing the evidence, found the defendants not guilty and rendered judgment against the plaintiff for costs. Littlejohn appealed to this court.

On June 26, 1886, Louesa Hill was the owner of the north half of said lot 30, except the north 256 feet thereof. On that date her husband, Benjamin Hill, executed and delivered to the Chicago, Evanston & Lake Superior Railway Company (hereinafter referred to as the railway company) the following agreement: "In consideration of one dollar to me in hand paid by the Chicago, Evanston & Lake Superior Railway Company, the receipt whereof is hereby acknowledged, I, Benjamin F. Hill, of Wilmette, Ill., hereby propose and agree to sell and convey to said railroad company, by a good and sufficient warranty deed, clear of all incumbrances, released of dower, and also to furnish a perfect abstract of title or certified copy thereof, the following real estate, situated in Cook county, state of Illinois,

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viz.: A strip of land one hundred and fifty (150) feet in width on the westerly side and one hundred feet in width on the easterly side of the line of said railway company's proposed right of way as surveyed and located through the north half (except the north 256 feet thereof) of lot twenty-nine (29) and the north half (except the north 256 feet thereof) of lot thirty (30), all in the subdivision of Baxter's share of Ouilmette reservation: Provided said railroad shall be constructed and in operation through the village of Wilmette within one year from date and said company shall locate and build a depot adjoining Hill street, in said village, at which all its suburban and local passenger trains shall stop. Deed to be delivered when road is built and in operation, but said company may enter upon said premises at once upon its acceptance of this proposition, for the purpose of constructing and operating its said railroad, at the price of one dollar to be paid to me by said company on the delivery of said deed. This proposition to be good and binding upon me, my heirs and assigns, if accepted by said company at any time within ninety days from date. Said real estate to be used by said company for its right of way and other railroad purposes in the construction and operation of its railroad," etc.

The railway company did not take possession of the strip in question until the fall of 1888. Before taking possession, an agent for the railway company asked Hill, in the presence of his wife, if the contract could be considered still in force, to which Hill replied in the affirmative. Soon after this conversation the railway company entered upon the land, constructed a roadbed, laid tracks, and had trains in operation over this line on January 1, 1889. About a year later it constructed fences on each side of the strip in question, and built a depot on the north side of Hill street, just across the street from the strip of land in controversy, which is immediately south of Hill street and within the village of Wilmette. The railroad was not constructed through that village. It entered the village from the southeast and extended only a short distance north of the southern boundary line, and lacked about two miles of going through the village. Nothing further has been done by the railway company towards complying with the provision of the agreement requiring it to construct and operate a railroad through the village of Wilmette. On August 1, 1890, Benjamin Hill and Louesa Hill, by warranty deed, conveyed to Edward A. Burge the N. $\frac{1}{2}$ of said lot 30, except the north 256 feet thereof. Immediately following the description the deed continues: "This conveyance is made-subject to the agreement for right of way to the Chicago, Evanston & Lake Superior Railway Company across the easterly end of said premises, together with a reversionary right to the center of the streets around said premises and to the portion used by said railway in case of the vacation of said streets or either of them and in case the railway company should give up their right aforesaid." On the same

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day the above deed was executed, Burge, by warranty deed, conveyed to appellant, Littlejohn, the same premises. The language above quoted from the deed to Burge was also inserted in the deed to Littlejohn. On June 4, 1903, Littlejohn made demand in writing upon the defendants for possession of the strip of land in question, and, the demand not being complied with, on the 16th day of the same month he brought this suit. Certain propositions of law were submitted to the superior court by the plaintiff, some of which were given and others refused. These propositions of law presented the questions whether the plaintiff had proved title in himself, and whether the defendants had shown any title or right to possession.

Arnd & Arnd, for appellant.

Charles B. Keeler (*George R. Peck*, of counsel), for appellee.

SCOTT, J. (after stating the facts). Treating the agreement signed by Benjamin Hill as binding upon his wife, Louesa Hill, by reason of her acquiescence therein, but without determining whether it is in fact binding upon her, the first question presented for our determination is whether the deed from Louesa Hill to Burge, and that from Burge to Littlejohn, conveyed the legal title to the strip in question to the latter. The position taken by appellees seems to be that the railroad company had acquired title to the strip by taking possession under the agreement with Louesa Hill, made through her husband, and that the only interest which Louesa Hill had in that strip at the time she delivered the deed to Burge was a reversionary interest, or a possibility of reverter in case the railway company should thereafter abandon the strip as a right of way. We cannot agree with this contention. An agreement with a railroad company for the conveyance of a right of way stands on the same footing as any other contract for the conveyance of land. *St. Louis & Belleville Electric Railway Co. v. Van Hoorebeke*, 191 Ill. 633, 61 N. E. 326. The railway company did not obtain any title whatever by virtue of the agreement with Louesa Hill, and by the terms thereof would not be entitled to a conveyance of title until it had performed certain conditions precedent. It was by the agreement given a license to enter upon the land to construct a roadbed and lay tracks and operate its trains while complying with the conditions. Such license, however, gave right to possession only, and not title. It is clear that the legal title to the strip of land in the possession of the railway company had not passed from Louesa Hill up to the time she delivered the deed to Burge.

Appellees contend, however, that by her deed to Burge Louesa Hill recognized title to the right of way in the railway company and excepted such right of way from the grant to Burge. This contention is based upon that part of the deed which grants to Burge a reversionary right to the por-

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tion of the premises used by the railway company in case the railway company should give up its right of way. The conveyance, however, is not made subject to the right of way, but only subject to the agreement for right of way. In order to except property included in the description of a deed from the operation of the grant, the intention so to do must be expressed in clear and certain terms. We do not think the language used in the deed following the description of the premises clearly indicates an intention on the part of the grantor to except the right of way from the operation of the deed, or recognizes title in the railway company. The purpose which Louesa Hill evidently had in mind in mentioning the reversionary right, after conveying property by a description which included the strip occupied by the railway company, was to pass title to the strip in case the railway company should comply with the provisions of the agreement for right of way, receive a deed therefor, and afterwards abandon such right of way. It follows that the legal title to the strip in question passed to Littlejohn by his deed from Burge.

The only remaining question is whether the defendants proved their possession to be rightful. Other than the rights claimed to have been reserved to them by the deeds above mentioned, they rely solely upon the agreement with Louesa Hill, through her husband, and the rights thereby conferred. The rights conferred by the agreement were: First, a license to enter upon the land for the purpose of constructing a roadbed, laying tracks, and operating trains while performing the conditions contained in the agreement; and, second, the right to a deed upon performing such conditions. The license was irrevocable only during the time specified in the agreement for complying with the conditions. After the termination of such period, if those conditions had not been performed, the license was revocable at the will of the licensor or her grantee. *Kamphouse v. Gaffner*, 73 Ill. 453. It is conceded by appellees that the condition requiring the railroad to be constructed and operated through the village of Wilmette has not been performed. There was a breach of all the conditions of the agreement before the railway company went into possession, as it did not take possession within one year from the date of the contract, and at law Louesa Hill, or the owner of the legal title claiming through her, had a right to terminate the contract at any time thereafter before the conditions had been complied with, and to revoke the license under which the railway company was in possession. Littlejohn terminated the contract and revoked the license on June 4, 1903, by making demand in writing upon defendants for the possession of the land. After such demand the possession of the defendants ceased to be rightful under the contract with Louesa Hill.

Appellees rely upon *Sands v. Wacaser*, 149 Ill. 530, 36 N. E. 960, and similar cases decided by this court, as showing

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their possession to be rightful. It will be observed upon examination of those cases that the conditions, the performance of which would entitle the railroad company to a deed for the premises, had all been complied with before any attempt was made to declare a forfeiture of the contract; the only contention being that the conditions had not been performed within the time specified by the contract. In such case it is held that the owner of the land, having permitted the railroad company to enter upon the land and perform the conditions after the expiration of the time specified by the contract, has waived the right to declare a forfeiture of the contract on account of the conditions not having been performed within such time, and that a subsequent grantee can not be heard to complain of laches which his grantor had waived. Here, however, the railway company not only failed to comply with the conditions within the time fixed by the contract, but it failed to perform one of the conditions at all, although nearly 17 years have elapsed since making the agreement. We do not think the failure of Louesa Hill to declare a forfeiture of the contract at the expiration of the time fixed for performance was a waiver of the right in herself or her grantee to insist upon a performance of the conditions at some future time or to declare a forfeiture for nonperformance. This case is therefore plainly distinguishable from those cited by appellees.

Appellees also argue that the railway company is seized of an estate upon condition subsequent. The conditions were plainly conditions precedent. The railway company, by the terms of the agreement, could not demand a deed until it had performed all such conditions, and, as no such deed was in fact delivered to it, it never became seized of any estate whatever which the law recognizes. The law in regard to estates upon condition subsequent, sought to be applied by appellees, has no bearing upon this case.

The plaintiff proved title in himself. The defendants failed to prove any title whatever or any right to the present possession of the strip of land occupied by them. The judgment of the superior court will therefore be reversed, and the cause will be remanded to that court for further proceedings in conformity with the views herein expressed.

Reversed and remanded.

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(Supreme Court of Tennessee, July —, 1906.)

[95 S. W. Rep. 179.]

Removal of Causes—Citizenship—Joint Tort.*—Plaintiff brought suit for death of his intestate against defendant railroad company and the engineer and conductor of the train by which deceased was killed, both of whom were of the same citizenship as plaintiff. The declaration alleged negligence, consisting of a failure to warn deceased that the track where deceased was directed to work was defective, and that the operatives of the train negligently moved the same before deceased came out from between certain cars which he was engaged in coupling. It also alleged that "said negligence of the corporate defendant was done by and through its servants (to wit, the conductor and engineer), and was the joint negligence of all the defendants, and that the injuries and death suffered by plaintiff's intestate were the true and proximate result of the combined joint and concurrent negligence of the corporate defendant and its codefendants then in its service." Held, that the declaration stated a cause of action for a joint tort committed by all of the defendants, and that the railroad company, whose citizenship alone was diverse, was therefore not entitled to remove the cause to the federal court.

Same—Joinder of Defendants—Intent—Fraud.*—Where, in a suit for death of a railroad employee, plaintiff had a good cause of action for a joint tort against the railroad company and against certain of its servants, whose citizenship was the same as plaintiff, it was immaterial to the railroad company's right to remove the cause to the federal court, because its citizenship was diverse, that plaintiff joined the resident defendants for the purpose of avoiding federal jurisdiction.

Master and Servant—Injuries to Servant—Negligence—Evidence.—In an action for death of plaintiff's intestate while employed to learn the business of a railroad brakeman, evidence held insufficient to charge the conductor and engineer of the train on which intestate was employed with negligence in starting a portion thereof without first ascertaining that intestate was not between the cars, where he had been expressly warned and directed not to go.

Same—Brakeman—Fellow Servant.†—Where intestate was killed by the starting of a portion of the train on which he was employed by reason of the negligence of one of the brakeman in signaling the engineer to proceed before plaintiff had emerged from between two cars, where he had gone to couple the air hose, the negligence of the brakeman was the negligence of intestate's fellow servant, for which the railroad company was not liable.

Same—Instruction of Employees—Rules.‡—While a railroad com-

*For the authorities in this series on the subject of the right to remove cause to federal court because of diversity of citizenship, see foot-notes appended to *White's Adm'r v. Chicago, etc., R. Co.* (Ky.), 20 R. R. R. 849, 43 Am. & Eng. R. Cas., N. S., 849.

†For the authorities in this series on the question whether the members of the same train crew are fellow servants, see foot-notes appended to *Johnson v. Boston & M. R. R.* (Vt.), 19 R. R. R. 680, 42 Am. & Eng. R. Cas., N. S., 680.

‡For the authorities in this series on the subject of the duty of railroads to make and promulgate rules for the guidance and protection of their employees, see foot-notes appended to *Merrill v. Oregon Short Line R. Co.* (Utah), 19 R. R. R. 221, 42 Am. & Eng. R. Cas., N. S., 221; foot-notes appended to *Shuster v. Philadelphia, etc., R. Co.* (Del.), 19 R. R. R. 6, 42 Am. & Eng. R. Cas., N. S., 6.

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pany is bound to promulgate rules for the government of its employees and to enforce their obedience, it is not absolutely required to adopt and promulgate a code of rules for the education of beginners prior to inducting them into its service.

Error to Circuit Court, Davidson County; John W. Childress, Judge.

Action by R. W. Vincent, as administrator of the estate of Joseph Vincent, deceased, against the Louisville & Nashville Railroad Company and others. From a judgment for plaintiff, defendants railroad and Edward L. Schubert bring error. Reversed and remanded.

Smith & Maddin, for plaintiffs in error.

W. H. Washington and *W. Hughes*, for defendant in error.

MCALLISTER, J. The plaintiff below, as administrator of his minor son, Joseph Vincent, recovered a verdict and judgment in the Circuit court of Davidson county against the plaintiffs in error for the sum of \$4,000, as damages for the alleged negligent killing of the deceased. John C. Hayes, the engineer of the corporate defendant, was also sued, but the jury returned a verdict in his favor. The railroad company and Edward L. Schubert appealed, and have assigned errors.

The declaration contains three counts, and in the first count charges that the deceased Joseph Vincent had been employed by the defendant company in the capacity of a cub or as a learner, and that at the time of his employment he was wholly inexperienced and ignorant touching his duties. It is then alleged that the company was guilty of negligence in failing to provide suitable and proper rules for instructing cubs, and for inducting them into its services, and in employing incompetent servants, as well as in maintaining a defective track at the point of the injury.

It then alleges that the railroad company delegated to the conductor and engineer and train crew the duties it owed the deceased of instruction and protection from danger. It further alleges that all of the defendants were guilty of negligence in failing to instruct and warn the deceased, as ordinary care required, and negligently ordered him to make a coupling at a point over a defective track, and that while the deceased was in between the cars, the defendant negligently caused the train to run over and kill him, and that all these acts of negligence combined to cause his death, and that his death was due to the joint, combined, and concurrent negligence of all of the defendants.

(2) It is alleged in the second count that the conductor ordered the deceased to make the coupling at a defective and dangerous place in the track, and that while there, the conductor and engineer negligently moved the train and killed him; that all of said acts of negligence joined to cause his

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death, and that his death was due to the joint negligence of all the defendants.

(3) It is charged in the third count that deceased was a cub and learner, as set out in the first and second counts of the declaration, and charges that the defendants negligently failed to warn deceased the train would move, and negligently failed to warn the engineer that deceased had not come out and that the engineer negligently moved the train before deceased came out. And that said acts of negligence jointly contributed to and caused the death of deceased, and that his death was the result of the joint negligence of all the defendants. This is a condensed statement of the action as laid in the several counts of the declaration.

A preliminary question arises on the record which must be considered before entering upon an investigation of the remaining assignments of error, viz.: The right of removal of the defendant railroad company.

It appears from the wayside bill of exceptions that on the 20th of November, 1903, the defendant railroad company filed a petition to remove the cause to the United States Circuit Court. The proper allegations were made in respect of citizenship, the amount involved, and the further averment that the allegations of joint negligence contained in the declaration did not as a matter of law, state a case of joint negligence.

It was further averred in the petition that the declaration alleged a separate and separable controversy with the railway company alone, in that it averred that deceased was placed to work upon a defective, unballasted track, full of holes and uneven, which exposed him to unusual dangers. It was not alleged therein that it was any part of Schubert's or Hayes' duty to ballast the track or keep it in good condition, but this was wholly the duty of the petitioner, and therefore this was a controversy solely between plaintiff and petitioner.

The petition further averred that Schubert and Hayes were fraudulently joined for the sole purpose of defeating the jurisdiction of the United States Circuit Court, and of fraudulently preventing petitioner from removing the cause to the United States Circuit Court; that Hayes and Schubert were men of reasonably moderate means, unable to pay any such sum as was sued for — \$30,000. Petitioner was solvent, and good for any sum that might be awarded.

An answer was filed to this petition by the plaintiffs below, denying that Schubert and Hayes were fraudulently joined as defendants, or for any illegal or improper purpose; that plaintiff joined them because the law gave him the right to sue all who were guilty of joint and concurrent negligence in causing the death of the deceased, and stating that Schubert and Hayes earned from \$1,800 to \$2,500 a year.

The circuit court, upon a consideration of the petition and answer, declined to allow the removal of the suit.

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It further appears that upon the close of the argument of counsel, and after the defendant's evidence had been heard, but before the court had charged the jury, the defendant railroad company filed another petition to remove the cause to the United States Circuit Court. That petition was in due form and embodied the usual statutory requirements, and was duly verified. It also referred to the original petition for the right of removal and readopted and reaffirmed the allegations contained therein.

In addition to these averments, it was charged in the petition that counsel for plaintiff, in his concluding address to the jury, made use of the following language, viz.: "It is proper that I should state to you why we joined the defendants Hayes and Schubert in this suit. We did not expect Mr. Hayes or Mr. Schubert to pay this judgment, or much of it, any way. They have not much means. I do not care what becomes of Hayes. You may find a verdict in his favor. We simply joined these people to prevent the removal of this case to the federal court and to keep it in a Tennessee court and before a Tennessee jury. But when you come to consider the case, don't turn Schubert loose just out of sympathy for him, because the minute you do the defendant company will file a petition to remove this case to the United States Circuit Court."

The petition then charges that said Schubert and Hayes were fraudulently joined for the sole purpose of preventing the removal of this case to the federal court, as evidenced by the above statement of the plaintiff, through his counsel.

It is further averred in the petition that on the trial of the case, the allegations in the declaration charging concurrent and joint negligence were not sustained by the proof, and there was no proof made in the case under which any judgment could be properly rendered against either Mr. Hayes or Mr. Schubert, and there was not any proof under which any joint judgment could be rendered against either Mr. Hayes or Mr. Schubert, and there was not any proof under which any joint judgment could be rendered against any two or more of the defendants, and no proof of joint or concurrent negligence.

It was further averred that plaintiff's counsel had admitted in open court that there was no proof of negligence under which Mr. Hayes would be held or under which any verdict could be rendered against him. The petitioner further states that this petition to remove the cause was filed after the argument of counsel, and before the court charged the jury, it being filed as the next step in the cause after said argument was made by plaintiff's counsel.

The court overruled the prayer of the petition for a removal of the cause, to which action counsel for the railroad company excepted, and filed a bill of exceptions.

The action of the trial judge in overruling the application

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for the removal of the cause is assigned as error, for the following reasons, viz.:

(1) Because the allegations of the declaration did not state a joint cause of action.

(2) Because the case contained a separate and separable controversy solely between the plaintiff and the railroad company.

(3) Because the petition to remove alleged that the local defendants were fraudulently joined solely to prevent the removal of the case to the United States Circuit Court.

We will first notice the question of fraudulent joinder.

It is insisted that upon the allegations of the petition, it was the duty of the court of primary jurisdiction to order the removal to the United States Circuit Court and let that court try the question of fraudulent joinder. It is said that it was not within the jurisdiction of the state court to determine or try this question.

In *Union Terminal Ry. v. C., B. & Q. R. R.* (C. C.) 119 Fed. 210, the plaintiff sued the Chicago, Burlington & Quincy Railroad, a nonresident, and a local defendant, the Council Bluffs Railway, alleging joint and concurrent negligence. The Chicago, Burlington & Quincy Railroad filed a petition to remove on the ground of fraudulent joinder for the sole purpose of defeating removal. The cause was removed, and on motion to remand, the United States Circuit Court said: "It is a settled rule of procedure that where the petition alleges a joint cause of action against a resident and a nonresident, defendant, the cause is not removable, although it is averred in the petition for removal that the resident defendant has no interest in the controversy, or that the cause of action is not joint. Nor is it sufficient that the answer of defendants raise a separable controversy or show that one of the defendants was not liable, but the rule is qualified by the proviso that the defendant moving for a removal may allege and prove to the satisfaction of the court that the local defendant was joined in the action for the fraudulent purpose of preventing a removal by the non-resident defendant."

In *Desty's Fed. Procedure* (9th Ed.) pp. 478, 479, it is said: "In order that joinder of defendants be regarded as fraudulently made for the purpose of avoiding the jurisdiction of the federal court, it must appear by allegation and proof, not only that it was made for that purpose, but also that the averments upon which the right to join such defendants is claimed is as unfounded in fact or incapable of proof as to justify the inference that they were not made in good faith, or with the intention of proving them." *Dillon on Removal of Causes*, § 43.

The declaration alleges that: "Said negligence of the corporate defendant was done by and through its said servants (to wit, the conductor and engineer) and other of its servants then and there in its employment, and said negligence was

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the joint negligence of all the defendants. And the said injuries and death of plaintiff's intestate were the direct and proximate result of the combined, joint, and concurrent negligence of the corporate defendant * * * and its codefendants * * * and other of its servants, agents, and officers then in its service."

It will thus be observed that the plaintiff in his original pleadings has seen fit to proceed against all the defendants jointly, although he might have proceeded against each severally. The authorities are to the effect that although the defendants may have each distinct defenses, this will not change the character of the action which must be determined from the face of the pleadings. One of the latest decisions on this subject is that of *Railroad Co. v. Dixon*, 179 U. S. 140, 21 Sup. Ct. 67, 45 L. Ed. 121. In that case, a train of defendant killed plaintiff's husband and intestate, and the conductor and engineer were joined in the suit with the railroad company as codefendants in the court below. The railroad company made an application to remove the case to the United States Circuit Court, because it was a nonresident of the state of Kentucky, where the suit was brought. The company filed the usual petition to remove, alleging that the suit was wholly between citizens of different states, etc., and that the conductor and engineer were joined as defendants for the sole and single purpose to prevent a removal, and that they were neither necessary nor proper parties. The state court overruled the application to remove, and the plaintiff afterwards having recovered a verdict, the case was appealed to the state Court of Appeals (47 S. W. 615), where it was affirmed, and afterwards by writ of error, removed to the Supreme Court of the United States.

Fuller, C. J., said: "The question to be determined is whether the Court of Appeals of Kentucky erred in affirming the action of Boy circuit court, in denying the application to remove. . . And that depends on whether a separable controversy appeared on the face of plaintiff's petition or declaration. If the liability of defendants, as set forth in that pleading, was joint, and the cause of action entire, then the controversy was not separable as matter of law, and the plaintiff's purpose in joining Chalkey and Sidles (the conductor and engineer) was immaterial."

In referring to the declaration, the court further said:

"It is stated that the 'negligence of the corporate defendant was done by and through its said servants and other of its servants then and in its employment, and the said negligence was the joint negligence of all the defendants.' Assuming this averment to be inconsistent with a charge of direct action by the company, it may, nevertheless, be held to amount to a charge of concurrent action when coupled with the previous averment that Dixon was killed, while crossing the track at

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a turnpike crossing, by the negligence of the company, and the other defendants in charge of the train. The negligence may have consisted in that the train was run at too great speed and in that proper signals of its approach were not given; and if the speed was permitted by the company's rules, or not forbidden, though dangerous, the negligence in that particular and in the omission of signals would be concurrent. Other grounds of concurrent negligence may be imagined. And where concurrent negligence is charged, the controversy is not separable."

Fuller, C. J., in the opinion, says further: "Plymouth Gold Mining Co. v. Amador & S. Canal Co., 118 U. S. 264, 6 Sup. Ct. 1034, 30 L. Ed. 232, and Connell v. Utica, N. & E. R. Co. (C. C.) 13 Fed. 241, are more in point on the precise question sought to be raised; and in the latter case, Mr Justice Blatchford expressed the opinion that it was proper for the federal courts to follow the decisions of the state courts, that a cause of action was entire."

Learned counsel for the plaintiff below makes the following application of the Dixon Case, which we think entirely sound, viz.:

"In the case at bar, the declaration charges that the acts of negligence causing the death of young Vincent were concurrent. As in regard to the rule allowing dangerous speed in the Dixon Case, that negligence being the negligence of the company, so in the case at bar, the negligence in failing to adopt reasonable rules instructing 'cubs' and inducting them into the service, and the negligence in allowing the track to remain unballasted, where it was to be used by the brakeman, was the negligence of the company. In the case at bar, it is charged that these acts of negligence were concurrent with the negligence of the conductor in sending Vincent to make the dangerous coupling at the place, in not giving him time to make it, and in causing the train to move, and moving the train before he came out. These acts of negligence concurred with the acts of negligence of the conductor and engineer, and other of its servants, then and there in the employment of the corporate defendant, to bring about the injury."

The question of joint torts was fully considered in the case of Beopple v. Railroad, 104 Tenn. 428, 58 S. W. 231, and therein the court says; "Instances where the wrongful acts of two or more persons concur as proximate causes of an injury, the wrongdoers are liable jointly or separately, and the fault of one is no defense for the other or others."

This case is cited in Coleman v. Bennett, 111 Tenn. 712, 69 S. W. 834, wherein the court says: "If the damage has resulted directly from the concurrent wrongful acts or neglects of two persons, each of these acts may be counted on as the wrongful cause, and the parties held responsible, either jointly or severally, for the injury. Cooley on Torts, 78, 79. If the

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concurrent or successive negligence of two persons, combined together, results in an injury to a third person, he may recover damages of either or both; and neither can interpose the defense that the prior or concurrent negligence of the other contributed to the injury." 1 Thomp. on Neg. § 75.

An illustration of joint and concurrent negligence may be found in the case of Railroad v. Kenley, 92 Tenn. 207, 21 S. W. 326, wherein it was alleged the company was negligent in maintaining a defective foot rest on the car and the engineer was negligent in jamming the train. The court said: "There was evidence tending to show that at the moment Kenley put his foot upon the defective foot rest to ascend to the top of the train, there was a sudden jamming of the cars together, and that the injury was brought about by the concurrent negligence of the engineer in causing the jam, and on the company through the defective foot rest * * * 'If the negligence of the master combines with the negligence of a fellow servant, and the two contribute to the injury, the servant injured may recover damages of the master.'" And the court might have added that liability also might be enforced against the engineer for his concurrent act of negligence. 2 Labatt on Master & Servant, § 649.

In 1 Sutherland on Damages, § 140, the learned author thus states the law:

"Where a master is liable for the tort of his servant, a principal for that of his agent or deputy, they are jointly liable."

In Schumpert v. Southern Railway Co. et al. (S. C.; March, 1903) 43 S. E. 813, which was a case of colliding trains, wherein the engineer of one train sued the company and Hutchison, the engineer of the other train, in the same action, the declaration charged that the injury was due to the negligence of the company in having defective air brakes on the train opposing Hutchison's train, and was also due to the negligence of Hutchison in not remaining on a siding and in running on the main line upon the time of the train upon which plaintiff was engineer. And the declaration alleged that the injury to plaintiff was the result of the joint and concurrent negligence of the defendants.

The court said:

"The servant is liable because of his own misfeasance, or wrongful act, in breach of his duty to so use that which he controlled as not to injure another. The master is liable because he acts by his servant, and is therefore bound to see that no one suffers legal injury through the servant's wrongful act done in the master's service within the scope of the agency.

"Both are liable jointly because from the relation of master and servant, they are united or identified in the same tortious act resulting in the same injury."

It is urged, however, that counsel for the plaintiff below, in his closing address to the jury, frankly admitted that con-

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ductor and engineer had been made parties defendant with removal and defeating the jurisdiction of the United States Circuit Court. If, however, the plaintiff in his declaration and proof made out a prima facie case of joint and concurrent liability on the part of all the defendants, his motive in joining them is wholly immaterial.

In the case of *Macey v. Childress*, 2 Tenn. Ch. 442, Judge Cooper stated the law on this subject as follows: "It is no defense to a legal demand instituted in the mode prescribed by law that the plaintiff is actuated by personal or improper motives. The motives of a suitor cannot be inquired into in such a case. Were it otherwise, nearly every suit would degenerate into a wrangle over motives and feelings."

In *Phelps v. Nowlen*, 72 N. Y. 39, 28 Am. Rep. 93, it is said: "The courts may not inquire into the motives actuating a person in the enforcement of a legal right." In *Kiff v. Youmans*, 86 N. Y. 329, 40 Am. Rep. 543, it is said: "The exercise of a legal right cannot be affected by the motive that controls it."

In *Goff's Adm'r v. Norfolk R. R. Co.* (C. C.) 36 Fed. 301, the court said: "The reasons and motives actuating the real beneficiaries and administrator in bringing suit in this court are immaterial."

In *Warax v. C., N. O. & T. R. R. Co.* (C. C.) 72 Fed. 638, Judge Taft, delivering the opinion of the court, said: "Plaintiff's petition seeks to hold the railroad company and Snyder, as engineer, as joint tort-feasors. If, on the statement in the petition, he is able to do so, then the cause is not removable unless it be made to appear to the satisfaction of the court that one of the defendants was fraudulently joined for the purpose of defeating the jurisdiction of the federal court. In order that such joinder should be regarded as fraudulent, it must appear by allegation and proof not only that it was made for the purpose of avoiding the jurisdiction of the federal court, but also that the averments of the declaration upon which the right to join the defendants is claimed, are so unfounded and incapable of proof as to justify the inference that they were not made in good faith with the hope and intention of proving them, or else that they do not state a joint cause of action. No proof is offered in this case except the fact that suit was once brought on the same cause of action against the railroad company without joining Snyder, the engineer. This may be regarded as a circumstance tending to show that the purpose of joining Snyder was to avoid the jurisdiction of the federal court; but it does not show, or have any tendency to show that the averments of the declaration with respect to Snyder, upon which the right to join Snyder is asserted, were unfounded in fact. One who has a real cause of action for a joint tort against two persons cannot be deprived of the right to bring his action against both and to retain both in the case, and to

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have the case heard with both as defendants, merely because he joined them for the purpose of avoiding the jurisdiction of the federal court. If the right exists, the motive of its exercise cannot defeat it."

So in *Hukill v. Railroad* (C. C.) 72 Fed. 745, it was said: "If a plaintiff has a good cause of action for a joint tort against several defendants, it is not fraudulent in him to join them all in his suit, even if it does appear that he would not have joined the resident defendants with the nonresident defendants except for the purpose of avoiding the jurisdiction of the federal court. Where he has reasonable ground for a bona fide belief in the facts upon which the defendants depend, his motives in joining them cannot be questioned." *L. & N. R. Co. v. Wangelin*, 132 U. S. 599, 10 Sup. Ct. 203, 33 L. Ed. 473; *Charman v. Railroad Co.* (C. C.) 105 Fed. 449; *Diday v. Railroad Co.* (C. C.) 107 Fed. 565; *Plymouth Gold Mine Co. v. Amador, etc.*, 118 U. S. 270, 6 Sup. Ct. 1034, 30 L. Ed. 232; *Little v. Giles*, 118 U. S. 596, 7 Sup. Ct. 32, 30 L. Ed. 269; *Simpson v. Dall*, 70 U. S. 460, 18 L. Ed. 265; *C. & O. R. R. v. Dixon*, 179 U. S. 135, 21 Sup. Ct. 67, 45 L. Ed. 121; 18 *Encyc. of Pl. & Pr.* 202, and Notes.

It will be observed, moreover, that counsel in his remarks touching the purpose for which the engineer and conductor were made defendants to the present action, did not state or admit they were not liable personally, concurrently and jointly with the railroad company for the wrong and injury inflicted. On the contrary, counsel stated that on account of the insolvency of the resident defendants that little satisfaction could be expected of any judgment that he might recover; and that as to the defendant Hayes, he was willing that a verdict might be returned by the jury in his favor; but he protested against the release of Schubert, the conductor, on account of any sympathy the jury might have for him; since, in his opinion, the effect of such action would cause a removal of the case to the United States Circuit Court.

In our opinion, the first petition was properly overruled by the court for the reason that the declaration stated a *prima facie* case of joint and concurrent liability against all the defendants, and no countervailing proof was presented by affidavit or otherwise, as required by the federal practice; nor was the company entitled to a removal under the second petition because the admissions of counsel do not show a fraudulent joinder.

We are further of opinion that no separable controversy with the nonresident defendant, independent of the other defendants, is presented in the pleadings.

In *Railway Co. v. Hendricks*, 88 Tenn. 710, 13 S. W. 696, 14 S. W. 488, it is said: "Whether a separable controversy exists such as entitles a nonresident sued jointly with a resident in a state court to a removal of the cause to the federal court must be determined solely from the face of the record in the said court as

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it appears at the time of the filing of the petition for removal, without any aid from averments of the petition or affidavit, unless the petitioner both alleges and proves that his joinder with a resident defendant was wrongful, and done for the fraudulent purpose of preventing such removal."

In 2 Foster's Fed. Practice (3d Ed.) at page 924, it is said: "For the purpose of determining whether a controversy is separable, the allegations in the bill or declaration must be taken as true. A controversy is not separable when a defendant who would otherwise be entitled to remove the suit is charged as jointly liable with another defendant who is a fellow citizen with the plaintiff. Such a case cannot be removed by a defendant whose citizenship is different from that of the plaintiff, even if the alleged cause of action is both joint and several, whether in tort or contract if the plaintiff has sued the defendant jointly, although a state statute permits judgment to be rendered for or against one or more of the plaintiffs, and for or against one or more of the defendants. Where the plaintiff has sued a master and servant, or a corporation and its receiver jointly for the same tort, there is no separable controversy."

It may be remarked that the controversy in the present case is the death of the plaintiff's intestate, and the declaration alleges that his death was brought about by the concurrent action of all the defendants; whether one or all may be responsible for the death is to be determined, of course, by the proof; but the plaintiff is entitled to have his controversy presented in his declaration passed on by the jury; and until it has been so determined, it is waged against all of the defendants jointly.

Since this opinion was prepared, the United States Supreme Court decided the case of Alabama Great Southern Railway v. H. C. Thompson, Adm'r of Florence James, Deceased, 26 Sup. Ct. 161, 50 L. Ed. —, in an opinion delivered by Mr. Justice Day, which fully sustains our conclusions herein. The plaintiff was a citizen of Tennessee. The defendants were the Alabama Great Southern Railway Company, a corporation organized under the laws of Alabama, and William H. Mills and Edgar Fuller, both citizens of the state of Tennessee. The cause was then removed into the United States Circuit Court upon the ground that a separable controversy existed between the petitioner and the plaintiff as to which diversity of citizenship existed which could be tried without the presence of either of the individual codefendants of petitioner (the railroad). A motion to remand to the state court because no removable separable controversy appeared was overruled.

In that cause the declaration substantially averred that the intestate of the plaintiff while in the exercise of due care had been negligently, wrongfully, and carelessly run over while upon the track of the railroad company, by an engine and train of cars, owned and operated by the railroad company, which said train was at the time under the management and control of the indi-

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vidual William H. Mills as conductor and Edgar Fuller as engineer.

The court held that a case in which plaintiff in good faith has elected to sue jointly in tort a foreign corporation and its servants whose misconduct caused the injury complained of, does not—even if such joinder may be improper—present a separable controversy between plaintiff and the corporation which can be removed from a state to a federal Circuit Court without regard to the citizenship of the individual defendants. If he has improperly joined causes of action, he may fail in his suit; the question may be raised by answer, and the right of the defendant adjudicated. But the question of removability depends upon the state of the pleadings and the record at the time of the application for removal, and it has been too frequently decided to be now questioned that the plaintiff may elect his own method of attack and the case which he makes in his declaration, bill, or complaint, that being the only pleading in the case, is to determine the separable character of the controversy for the purpose of deciding the right of removal.

So that, in our opinion, both the original and renewal petitions for removal were properly dismissed by the trial judge.

The next assignment of error we shall consider is that there is no evidence to sustain the verdict and judgment below.

The record reveals that the deceased, Joe Vincent, at the time of his death was in the 21st year of his age. It appears that almost from childhood he had been working and earning his own livelihood. At one time he had been working in a butcher shop and for four months was a conductor on an electric street car. Immediately prior to his last employment by the defendant company, he had been engaged for 12 months as a caller in the terminal yards at Nashville. His occupation required his presence in the yard about half the night and half the day. According to the testimony of the yardmaster, he was an unusually active, bright, and intelligent boy. While thus occupied, he made application for the position of brakeman on a freight train, representing himself to be 21 years of age, since the rules of the company forbade the employment of any trainmen under that age. The deceased was accordingly employed and placed in charge of the conductor on a local freight train between Decatur, Ala., and Nashville, Tenn., to learn the duties of his employment. He was to receive \$1 per day as a cub, working 16 days a month, while as a regular brakeman he would receive \$60 per month.

The train crew with whom he was associated consisted of Edward L. Schubert, conductor, John C. Hayes, engineer; Thompson, fireman, with Webster, White and Ezell as brakemen. It appeared that deceased made two round trips from Nashville to Decatur, and then a third trip to Decatur. The accident resulting in the death of the deceased occurred on a siding of the railroad company at a small station south of Franklin, Tenn.,

on his return trip from Decatur to Nashville. At that point his freight train had orders to take up five empty coal cars standing on a siding east of the main track near Perry's siding. All these cars were provided with appliances for air brakes, each having a rubber hose at each end which when coupled connected the air for the air brake. The air hose in these empty cars had been uncoupled. Three of these coal cars were coupled together with the automatic brake and stood several car lengths north of the two remaining cars. The engine and three freight cars were then detached from the train on the main track and moved north for the purpose of backing into the side-track to take up the five empty coal cars. The first three cars standing on the siding were then coupled by Schubert, the conductor, to the three cars already attached to the engine. The engine and six cars were then backed southwardly several car lengths toward the remaining two cars standing on the side track. White, one of the trainmen, then coupled on these two cars and signaled the engineer to move ahead, all the five cars being then coupled to the train. Schubert, the conductor, repeated White's signal, and the fireman repeated it to the engineer, who immediately moved the train. When the cars had moved a short distance, probably 30 or 40 feet, Schubert, the conductor, was attracted by a voice of distress on the other side of the cars, and immediately signaled the train to stop. He at once crossed over between two of the cars and found the deceased, Joe Vincent, lying near the track, badly injured. White, the brakeman, reached the deceased almost immediately, and in three or four minutes he was joined by Hayes, the engineer. When the trainmen reached the deceased and asked him how he got hurt, he stated that he was trying to couple the air hose and told White to hold the train until he came out. It is due the brakeman White to say that he testified on the trial that he did not hear the remark of deceased, and was not aware he was at the coupling.

This evidence was excepted to by counsel for the defendants, but was admitted and is made the basis of an assignment of error. The deceased also stated to Ezell, a witness for defendant, that he was trying to couple the air hose. It is admitted that the conductor gave the signal to move the train while the deceased was completing the coupling, and that the train moved before the deceased could get out, thus inflicting the injury.

There is proof tending to show that when the trainmen were making these couplings all the crew were on the west side of the cars, and were in the inside of the curve in the track between the main track and side track, and there is proof tending to show that on this account neither Schubert nor any of the trainmen were aware of the presence of the deceased beneath the car making the coupling of the air hose. On the other hand, it is insisted on behalf of the defendants in error that the deceased was assisting Schubert in making the coupling and that there is also evidence tending to show that the deceased was at White's

coupling, and this seems to be the contention made on behalf of the plaintiffs below. The insistence is that deceased must have been at one or the other of the two couplings, and if he was at either, he was under the eyes of the conductor and brakeman. It was also claimed on behalf of plaintiff below that before the coupling was made the deceased and the conductor got out of the caboose together and that during the entire time consumed in making these couplings, they were close together.

It is further insisted that the conductor, by the exercise of the slightest diligence on his part, could have ascertained that the coupling was not completed, and that the negligence of the conductor in signaling the train forward under such circumstances establishes a case of liability against the company.

It is contended on behalf of the company that it was not customary to couple the air hose on the siding, and, hence, after the automatic brake was coupled, the conductor could not have anticipated that deceased was near the train making a coupling of the air hose. It appears, however, from testimony adduced on behalf of the plaintiff below that it was usual and customary to complete the coupling, including the adjustment of the air hose on the siding, before going upon the main track. It is admitted by the brakeman, White, that he did not adjust the air hose at his coupling, and plaintiff insists that that part of the coupling had been left by White and Schubert to Joe Vincent, the deceased.

There is ample evidence in the record to have warranted the jury in finding that it was the custom of defendant company to couple the air hose on the side track without waiting for the train to be finally made up on the main track; hence, this controverted question of fact is settled by the verdict of the jury in favor of the plaintiff below. Now, as already stated, the specific negligence laid at the door of the conductor was in not waiting a sufficient length of time for the coupling to be completed, and in signaling the fireman to move the train before the deceased had emerged from the car. It does not appear from this record that any witness saw the deceased go between the cars, or that any train man knew that he was trying to couple the air hose. This fact, however, is sought to be established by his post factum declaration, and by certain circumstances, which fix knowledge of this fact both upon White, the brakeman, and Schubert, the conductor.

Pretermitted, for the present, the declarations of deceased to the effect that at the time of the injury he was trying to couple the air hose, we shall advert to the circumstances which, it is claimed, charge the conductor with knowledge of the perilous position of deceased.

It appears from the testimony of one Ezell that deceased was hurt three car lengths north of the point where White made the second coupling. Schubert, the conductor, stated that deceased was found immediately after the accident "right near the

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north end of the second car from the rear end," which, according to plaintiff's contention, would place deceased immediately at White's coupling. White, it appears, was at the north end of the second car on the siding, and turned the knuckle of the automatic brake and made the coupling. He, however, states he did not couple the air hose. It is argued that deceased must have been with White when he made this coupling for deceased was found under the first of the two cars that White coupled. But we are unable to perceive how these facts fix knowledge on the conductor of the presence of deceased under the car; their only tendency is to show that White, the brakeman, had such knowledge and was guilty of gross negligence in signaling the conductor that the coupling had been made. But it must be conceded that, upon the authority of *Citizens' Rapid Transit Co. v. Dozier* (Nashville, December term, 1902) 72 S. W. 963, the deceased as a learner and the brakeman, White, were fellow servants, and there can be no recovery for the negligence of the latter.

It is conceded on the record that Schubert, the conductor, at the time White made the second coupling, was standing at least three car lengths north, and there is proof tending to show that his view of one on the opposite side of the train engaged in an effort to couple the air hose, would be obstructed both by the high sides of the gondola cars, and by the trucks and running gear underneath. It is, of course, conceded that the conductor in charge of a freight train stands in the relation of a vice principal to the other members of the crew, and the company is liable for any act of negligence on his part whereby an injury is inflicted upon any of the trainmen. *Railroad v. Dillard*, 114 Tenn. 240, 86 S. W. 313. *Ill. Central R. R. v. Spence*, 93 Tenn. 173, 23 S. W. 211, 42 Am. St. Rep. 907.

It is insisted, however, that it was the duty of the conductor to have known where deceased was at the time the second coupling was made, and that the company is liable for the negligence of the conductor in signaling the train ahead when he might have known, by the exercise of ordinary care, that the deceased was engaged in making a coupling of the air hose. It appears, however, from the testimony of the conductor and the other trainmen that it was no part of the duty of the deceased as a learner to go between the cars or underneath the cars for the purpose of coupling the air hose, but that, on the contrary, his act in doing so was in violation of repeated admonitions on the part of the conductor not to go between the cars and to refrain from exposing himself to any perilous position. The conductor testifies that he had expressly forbidden the deceased from going between the cars to make the air coupling, or for any other purpose; and that in learning the duties of a brakeman, his principal service was in loading and unloading freight and attending to such other duties as might be assigned him by the conductor. We find no testimony to the contrary in this record.

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The conductor further testified that when the train was detached for the purpose of making the coupling he left deceased standing at the caboose, a point some distance north of where White made the second coupling, and hence, the conductor had no reason to believe or to suspect that the deceased had placed himself in so perilous a position.

It further appears from the record that when these empty coal cars were being coupled together on the side track, all of the trainmen were on the inside of the curve; that is to say, on the west side of the track; and a view of all of them could be readily commanded by the conductor. The deceased, however, had taken a position on the east side of the train on the outside of the curve, and at a point where it was impossible for any of the other train men to see him, except White, the brakeman, who was making the second coupling. It has been stated that White in his testimony denies that he saw deceased, or had any knowledge of his presence in and about the coupling of the air hose.

It is insisted, however, on behalf of the plaintiff below, that there is evidence in the record that the admonitions of the conductor to the deceased against undertaking these couplings only applied when he was unassisted and in the absence of the other trainmen. But there is no testimony in the record that the admonitions of the conductor were so qualified. It is true the engineer testified that he warned the deceased never to go in and couple the air hose without first notifying him, and never to go in on the right side of the train and go out on the left, but to go in and out on the same side, in order that the engineer, to use his language, "might keep track of him."

It further appears that when deceased came to work, he was warned by nearly every member of the crew not to try to couple cars, or air hose; that it was dangerous and that he was not expected to do it; but was to look on, and see the others do it. These facts are proved by Hayes, Thompson, and Ezell, members of the train crew who were introduced as witnesses on behalf of the plaintiff, and also by the brakeman, White, whose deposition had been taken by the plaintiff, but was read in evidence by the defendant company.

It further appears from the uncontradicted proof that none of the crew saw the deceased cross over to the east side of the side track, and no one of them knew that he had gone in there to couple the air hose, or that he was in a position of danger until the accident happened.

Defendant in error, however, relies upon the fact that White, the brakeman, testified that the conductor first gave him (White) the signal to move forward, which signal was immediately followed by the signal of him, the said White. Counsel then argue that it was the grossest negligence on the part of Schubert, the conductor of the train, to signal the forward movement of the train when he could see, and was bound to know that the

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coupling was only half finished; that the conductor saw that White simply moved the knuckle, and this was notice to him that the coupling of the air hose was being performed by another. It is then said, the only person there who could have been engaged in that work was the deceased, for the reason that Ezell was 200 feet to the south, Webster was on top of the train right by the engine, the engineer and fireman on the engine, thus accounting for every man in that crew except the deceased.

Counsel argues that with all these facts staring Schubert in the face, he carelessly and negligently asserted his power as vice principal of that train by ordering it to move forward when the coupling was only half finished.

On the subject of the signals, and whether the first signal for the movement of the train was given by Schubert, the conductor, or by White, the brakeman, the latter testified that after he made the coupling, he gave them a signal that he had made it all right, to go ahead; and Schubert also signaled them ahead (referring, of course, to the fireman and engineer).

The witness White was afterwards asked:

"Don't you know the conductor gave his signal at the same time you did for the train to go forward? Haven't you stated that awhile ago?"

"A. As soon as he gave me the signal, I gave the signal.

"Q. Wasn't your signals almost together?"

"A. Of course he was not going to give one until he knew what I had done back there."

It stands to reason that the brakeman must give the first signal to the conductor to advise him that a coupling has been made before the latter would order a forward movement of the train; and we think the effect of the testimony on this subject is that White, the brakeman, after making his coupling, gave a signal to the conductor that it was made, and, thereupon, the conductor signaled the train forward. There is testimony in the record tending to show that the engineer would have moved the train forward on the signal of White, the brakeman, that he had completed the coupling, and that the train was ready for movement, but however that may be, it is shown on this record that the conductor signaled the train forward after receiving the signal of White that the coupling had been completed.

The deceased was found near the north end of the car next to the last. This point would be opposite the front trucks of the car that White had coupled. Ezell testified that he was hurt north of where White coupled; and Webster, that he was hurt south of Schubert's and north of White's coupling. Yet counsel for the plaintiff below argue that Schubert, the conductor, knew that deceased was assisting White in making his coupling, and did not take ordinary care to ascertain that he had gotten out from between the cars before he signaled the train to move. It is impossible for us to believe that the brakeman, White, or the conductor, Schubert, would have signaled a movement of

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this train if they had known or had cause to believe that deceased was making this coupling. It is incredible that any of these trainmen would have been guilty of so wanton and cruel an act, and as we have already stated, there is no evidence whatever in this record tending to fix any knowledge or negligent want of knowledge on the conductor for whose act the company would be responsible.

But, if we grant all that is claimed by counsel for plaintiff on the subject of the conductor's knowledge or negligent ignorance of the fact that the deceased had gone under the car to make the coupling, the conductor was warranted in acting on the signal of White that the coupling had been completed. The conductor in his position could not see deceased under the train, and must, of course, act upon the signal of his brakeman, and if the latter signaled the conductor that the coupling had been made, when in fact it had not been accomplished and deceased was still under the train, the death of the deceased must be ascribed proximately to the negligence of the brakeman—a fellow servant—in giving a premature signal, and not to the signal of the conductor, who was warranted in acting upon the signal of his brakeman.

We have carefully examined the record, and find no evidence whatever to sustain the verdict of the jury and the judgment of the court.

The second assignment of error is based upon the following instruction given by the trial judge to the jury, viz.: "The defendants owe a duty to one who is taken into its service as a learner of the duties of brakeman as follows: First, to adopt and promulgate reasonable rules and regulations for inducting vincent as a learner and cub into its service; in the next place, the duty to select and appoint competent instructors to instruct him as to the duties and dangers of the service of brakeman; in the next place, to put him under the control and charge of the instructors, to watch over and protect him from the dangers of the situation which he (Vincent) could not and did not appreciate; also to teach him his duties and warn him of the dangers of braking and coupling and uncoupling and adjusting the hose of the air brake and its attachments."

The first criticism upon this charge is that a railroad corporation owes no duty to learners to adopt and promulgate reasonable rules and regulations for inducting them into its service. The general rule is that it is the duty of any person or corporation engaged in a complex business to establish and enforce definite regulations for the protection of its employees, and a failure to adopt such rules, as well as laxity in their enforcement, is recognized as negligence. *Railroad v. Reagan*, 96 Tenn. 139, 33 S. W. 1050.

But in the present case the trial judge instructed the jury that it was the duty of a railroad company to adopt and promulgate reasonable rules and regulations for inducting a be-

ginner or learner into its service. The true rule prescribing the duty of a railroad to a youthful and inexperienced employee was thus announced in *Whitelaw v. Railroad*, 16 Lea, 397, 1 S. W. 37, as follows: "It is the duty of the master to give such warning, advice and instruction to a youthful and inexperienced employee as will enable him by the exercise of reasonable care to perform the duties of his employment with safety to himself; or in other words, to put him in the same condition with reference to the dangers of the employment as would be an experienced servant."

The uncontradicted proof upon this record is that when the deceased was received into the service of the defendant company, he was placed in charge of the conductor, Schubert, who fully warned him, advised him, and instructed him as to the duties and perils of the occupation. He was not only warned and advised by the conductor but by the engineer and every member of the train crew. He was especially admonished and instructed not to attempt to couple cars, or the air hose. The deceased was not an infant but a young man over 20 years of age, unusually bright, active, and intelligent, and with some measure of experience in the railroad service derived from his employment as caller in the terminal yards at Nashville for a period of 12 months. In our opinion, the undisputed proof is that the company fully complied with the rule enjoined in *Whitelaw v. Railroad*, supra; but it will be observed that the circuit judge, in his instructions to the jury, superadded a duty which, in our opinion, is not recognized by the authorities in that the company was operated with the duty of adopting and promulgating rules and regulations for inducting learners or beginners into its service. It is not shown that such a practice is usual or customary among other well-regulated companies. We think the jury were authorized to infer from the instructions of the trial judge that it was part of the duty of the defendant company to adopt a code of printed rules and regulations, especially designed for inducting learners into the service.

While the rule is recognized in *Railroad v. Reagan*, supra, that it is the duty of a railroad company not only to promulgate a code of rules for the government of its employees but to enforce their obedience, this is because it is everywhere recognized as the duty of a corporation engaged in a complex business of great magnitude; but while this is true, we know of no rule of law that absolutely requires the company to adopt and promulgate a code of rules for inducting beginners or learners into its service. We, therefore, are of opinion that the instruction of the circuit judge on this subject was erroneous. For the reasons stated, the judgment is reversed, and the cause remanded.

CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RAILWAY COMPANY, Plff. in Err., v. GEORGE BOHON, Administrator of Edward Cook, Deceased, and Fred. Milligan.

(Argued December 15, 1905. Decided January 2, 1906.)

[26 Sup. Ct. Rep. 166.]

Removal of Causes—Separable Controversy.*—An action to recover damages for a death from negligence, in which plaintiff has, in good faith, exercised his right under the state laws to proceed jointly against a railway company and its employees whose negligence caused the accident, cannot be converted into a separable controversy for the purpose of removal to a Federal circuit court because of diversity of citizenship between the plaintiff and the railway company.

In Error to the Court of Appeals of the State of Kentucky to review a judgment which affirmed a judgment of the Circuit Court of Mercer County, in that state, in favor of plaintiff in a joint action against a railway company and its employees to recover damages for a death caused by negligence, in which the railway company unsuccessfully sought to remove the case, as presenting a separable controversy, to the United States Circuit Court for the Eastern District of Kentucky. Affirmed.

See same case below (Ky.) 83 S. W. 580.

The facts are stated in the opinion.

Messrs. *John Galvin* and *Edward Colston* for plaintiff in error.

Messrs. *John W. Yerkes* and *Robert Harding* for defendant in error.

MR. JUSTICE DAY delivered the opinion of the court:

This case was considered by this court at the same time with the *Alabama G. S. R. Co. v. Thompson* (just decided) 200 U. S. —, ante, 161, 26 Sup. Ct. Rep. 161, and we need not repeat the discussion therein had as to the construction of the removal act of 1887 [24 Stat. at L. 552, chap. 373, U. S. Comp. Stat. 1901, p. 508], under the decisions of this court. This case has an additional feature which we shall proceed to notice. The action was brought by the defendant in error as administrator of Edward Cook, deceased. The petition charged that the plaintiff's intestate was engaged in the yards as a brakeman and switchman and was uncoupling and giving attention to the cars of the defendant company, which cars and an engine attached thereto were in charge of the defendant Milligan, as engineer, engaged in operating, managing, and controlling the same for the defendant company, and, while plaintiff's intestate was thus engaged, the defendant company and the defendant Milligan caught and crushed said Cook's body between the cars of the train, by and through the gross negligence of Milligan and of defendant

*See preceding case, and foot-notes.

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company, in the operation, management, and control of the engine and train; that the injuries to the plaintiff resulted in his death a few minutes thereafter, and when so caught and crushed said Cook was engaged in discharging his duties as brakeman to the defendant company; the death of said Cook was caused as aforesaid by the gross negligence and carelessness of defendant company and Milligan. The railroad company filed its petition in the state court for the removal of the cause to the United States circuit court for the eastern district of Kentucky, upon the ground that there was a separable controversy between the petitioner, a resident and citizen of Ohio, and the plaintiff below, who was a citizen and resident of Kentucky. The circuit court of Mercer county refused to remove the case, and a verdict and judgment were rendered for the plaintiff below. Upon appeal to the court of appeals of Kentucky, the judgment was reversed for errors occurring at the trial. At a second trial the verdict and judgment were rendered for the plaintiff below, which was again reversed and remanded. On the third trial the verdict and judgment were again rendered for the plaintiff below, which judgment was affirmed by the court of appeals of Kentucky. The sole question argued here is as to the correctness of the state court in refusing to order the removal of the cause, which judgment was affirmed by the Kentucky court of appeals.

The action for death by negligence is regulated by the Kentucky Constitution and statutes. Section 241 of the Constitution provides:

"Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the corporations and persons so causing the same."

Section 6 of the Kentucky statutes reads as follows:

"Whenever the death of a person shall result from an injury inflicted by negligence or wrongful act, then, in every such case, damages may be recovered for such death from the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same, and when the act is willful or the negligence is gross, punitive damages may be recovered, and the action to recover such damages shall be prosecuted by the personal representative of the deceased."

This statute undertakes to give an action for negligence against the companies or corporations responsible therefor and their agents or servants causing the same. The statute has been before the court of appeals of Kentucky, and in the case of *Winston v. Illinois C. R. Co.*, 111 Ky. 954, 957, 55 L. R. A. 603, 604, 65 S. W. 13, that court said of the state Constitution and this statute:

"The Constitution and statutes of this state, as construed by the repeated adjudications of this court, make the railroad company liable for the acts of the agents and servants in charge of its trains. If a servant is guilty of such negligence, while acting

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for his master, as will make the master responsible, then, in such a case, the servant is personally and equally responsible with the master for the damages resulting from the negligent act. The mere fact that the master may be responsible for the wrongful act of the servant does not relieve the servant from a joint liability with the master for the wrongful act which produced the injury and damage."

In the case under consideration, in the opinion of the court upon the question of right of removal, while it expressed the view that the weight of authority was in favor of the right to join the master and servant in actions for negligence, it reiterates its former view of the Kentucky statutes, citing *Chesapeake & O. R. Co. v. Dixon*, 104 Ky. 608, 47 S. W. 615, and the *Winston Case*, above referred to, and quoted from that case with approval:

"By the terms of this section, where death results from the negligent act, a recovery may be had therefor against the person or persons, company or companies, corporation or corporations, their agents or servants, causing the same. * * * The plaintiff has a right to proceed severally or jointly against those who are liable for the injury inflicted resulting in death."

We then have a case in which the extent of the right to recover damages for negligence is prescribed by the Constitution and statutes of the state of Kentucky, and which the courts of that state have construed to give a joint cause of action against the corporation and its agents or servants causing the same. In a recent case this court had occasion to deal with the question of removal under the separable controversy clause (*Southern R. Co. v. Carson*, 194 U. S. 136, 48 L. Ed. 907, 24 Sup. Ct. Rep. 609), on a writ of error to the supreme court of South Carolina. An action had been jointly brought in the state court against the Southern Railway Company, a corporation of Virginia, and Arwood, conductor, and Miller, the engineer, residents of Greenville county, South Carolina, charging the joint and concurrent negligence of the servant and the company, because of a defective coupler and the careless management of the train, and the railroad company claimed to have been deprived of the right of removal by the allegation of a joint and concurrent tort, unless the state court would charge that no recovery could be had unless a joint liability was shown, which it refused to do. After commenting upon the action, the Chief Justice, who delivered the opinion of the court, stated that the right of removal depends upon the act of Congress, that the company, upon the face of the pleadings, did not come within the act, and had made no effort to assert this right, and, citing the passage in *Powers v. Chesapeake & O. R. Co.*, 169 U. S. 92, 42 L. Ed. 673, 18 Sup. Ct. Rep. 264, quoted in the *Alabama G. S. R. Co. v. Thompson*, 200 U. S. —, ante, 161, 26 Sup. Ct. Rep. 161, said:

"The view thus expressed was reiterated in *Chesapeake & O. R. Co. v. Dixon*, 179 U. S. 131, 45 L. Ed. 121, 21 Sup. Ct. Rep. 67, where the subject was much considered and cases cited.

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Reference was there made to the fact that many courts have held the identification of master and servant to be so complete that the liability of both may be enforced in the same action. And such is the law in South Carolina. *Schumpert v. Southern R. Co.*, 65 S. C. 332, 95 Am. St. Rep. 802, 43 S. E. 813. In that case it was held that, under the state Code of Civil Procedure, in actions ex delicto, acts of negligence and willful tort might be commingled in one statement as causes of injury; that master and servant are jointly liable as joint tortfeasors for the tort of the servant, committed within the scope of his employment, and while in the master's service; that the objection that if master and servant were made jointly liable for the negligence of the latter the master could not call on the servant for contribution was without merit, as the rule was, as laid down by Mr. Cooley (*Torts*, p. 145), that: 'As between the company and its servant, the latter alone is the wrongdoer, and in calling upon him for indemnity, the company bases no claim upon its own misfeasance or default, but upon that of the servant himself.' And see *Gardner v. Southern R. Co.*, 65 S. C. 341, 43 S. W. 816. In *Rucker v. Smoke*, 37 S. C. 377, 34 Am. St. Rep. 758, 16 S. E. 40, and *Skipper v. Clifton Mfg. Co.*, 58 S. C. 143, 36 S. E. 509, it was decided that in actions such as this exemplary damages may be recovered. The suggestion that the state deprived the company of its property by the rulings of the supreme court calls for no remark."

While the case did not show an attempt to remove, the discussion of the subject by the Chief Justice strongly intimates that if the action was properly joint in the forum in which it was being prosecuted, it could not be removed as a separable controversy under the act of Congress. We have under consideration an act for tort which, by the Constitution and laws of the state, as interpreted by the highest court in the state, gives a joint remedy against master and servant to recover for negligent injuries. This court has repeatedly held that a separable controversy must be shown upon the face of the petition or declaration, and that the defendant has no right to say that an action shall be several which the plaintiff elects to make joint. See cases cited in *Alabama G. S. R. Co. v. Thompson*, 200 U. S. —, ante, 161, 26 Sup. Ct. Rep. 161. A state has an unquestionable right by its Constitution and laws to regulate actions for negligence, and where it has provided that the plaintiff in such cases may proceed jointly or severally against those liable for the injury, and the plaintiff, in due course of law and in good faith, has filed a petition electing to sue for a joint recovery given by the laws of the state, we know of nothing in the Federal removal statute which will convert such action into a separable controversy for the purpose of removal, because of the presence of a nonresident defendant therein, properly joined in the action under the Constitution and laws of that state wherein it is conducting its operations, and is duly served with process.

Judgment affirmed.

NEW YORK, NEW HAVEN & HARTFORD RAILROAD COMPANY,
Appt., *v.* INTERSTATE COMMERCE COMMISSION.

INTERSTATE COMMERCE COMMISSION, Appt., *v.* CHESAPEAKE &
OHIO RAILWAY COMPANY, and New York, New Haven, &
Hartford Railroad Company.

(Argued October 25, 26, 1905. Decided February 19, 1906.)

[26 Sup. Ct. Rep. 272.]

Commerce—Federal Regulation—Maintenance of Published Rates by Interstate Carrier—Undue Preferences and Discrimination.*—An interstate carrier not empowered by its charter or by any legislation existing at the time of the adoption of the act to regulate commerce to mine and market coal violates the mandate of that act respecting the maintenance of published rates, and its prohibitions against undue preferences and discriminations, by stipulating to sell and transport coal at an agreed price, insufficient to yield its published freight rates after deducting the cost of purchase and delivery.

Commerce—Federal Regulation—Maintenance of Published Rates by Interstate Carrier—Undue Preferences and Discrimination.*—Deliveries of coal by an interstate carrier not empowered to mine and market coal by its charter or by any legislation, existing at the time of the adoption of the act to regulate commerce, under a contract to sell and transport such coal at a stipulated price, come within the requirement of that act respecting the maintenance of published rates, and its prohibitions against undue preferences and discrimination whenever, from any cause, the gross sum realized is insufficient to yield the carrier its published freight rates after deducting the purchase price of the coal and the cost of delivery, although the contract may not have been open to that objection when made.

Statutes—Construction by the Body Charged with Enforcement.—The prohibitions of the act to regulate commerce as to rebates, favoritism, and discrimination having been construed by the Interstate Commerce Commission, charged with its execution, to be inapplicable to the freight rates for coal charged by interstate carriers empowered to mine and market coal by their charters or by legislation existing at the time of the adoption of that act, this construction, which has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, must be treated as read into the statute.

Injunction—Extent of Relief—General Injunction.—A carrier which has been adjudged to have violated the act to regulate commerce in a specific particular may be restrained from further like violations of the act, but should not be enjoined in general terms from violating the act in the future in any particular.

Cross appeals from the Circuit Court of the United States for the Western District of Virginia to review a decree enjoining an interstate carrier from violating prohibitions of the act to regulate commerce against undue preferences and discriminations. Modified by enjoining the taking of less than the pub-

*For the authorities in this series on the question, what is, and is not, discrimination in rates forbidden by the Interstate Commerce Act, see foot-note appended to *Laurel Cotton Mills v. Gulf & S. I. R. Co.* (Miss.), 12 R. R. R. 471, 35 Am. & Eng. R. Cas., N. S., 471.

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lished tariff of freight rates by means of dealing in the purchase and sale of coal, and as modified, affirmed.

See same case below, 128 Fed. 59.

The facts are stated in the opinion.

Assistant Attorney General McReynolds and *Mr. W. A. Day* for the Interstate Commerce Commission.

Messrs. John W. Daniel, John W. Griggs, and Fred Harper for the New York, New Haven, & Hartford Railroad Company.

Messrs. Randolph Harrison and A. R. Long for the Chesapeake & Ohio Railway Company.

MR. JUSTICE WHITE, delivered the opinion of the court:

Following an inquiry, begun in consequence of a complaint to it made, the Interstate Commerce Commission, through the Attorney General of the United States, filed under the act to further regulate commerce (32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1905, p. 599), in the circuit court of the United States for the western district of Virginia, this proceeding against the Chesapeake & Ohio Railway Company, a Virginia corporation, and the New York, New Haven, & Hartford Railroad Company, a corporation, of the state of Connecticut. In this opinion we shall hereafter respectively speak of the parties as the Commission, the Chesapeake & Ohio, and the New Haven. The petition averred that the Chesapeake & Ohio was engaged in the carriage of coal as interstate traffic between the Kanawha district of West Virginia and Newport News, Virginia, for delivery thence to the New Haven, in Connecticut, and charged that the traffic was being moved at less than the published rates, and in such a way as to produce a discrimination in favor of the New Haven road and against others, all in violation of the act to regulate commerce and the amendments thereto. Specifying the grounds of the complaint, it was alleged that in the spring of 1903 the Chesapeake & Ohio made a verbal agreement with the New Haven to sell to that road 60,000 tons of coal, to be carried from the Kanawha district to Newport News, and thence by water to Connecticut, for delivery to the buyer at \$2.75 per ton, and that a considerable portion had already been delivered and the remainder was in process of delivery. It was averred that the price of the coal at the mines where the Chesapeake & Ohio bought it and the cost of transportation from Newport News to Connecticut, would aggregate \$2.47 per ton, thus leaving to the Chesapeake & Ohio only about 28 cents a ton for carrying the coal from the Kanawha district to Newport News, whilst the published tariff for like carriage from the same district was \$1.45 per ton.

Referring to the developments before the Commission, and annexing as part the testimony taken on such hearing and the documents connected therewith, the petition further alleged that the Chesapeake & Ohio asserted that, although the total price which it received for the coal covered by the verbal agreement

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was less than the total outlay in delivering the coal, including its published rates, such fact did not amount to a departure from the published rates, and was not a discrimination, for two reasons: First. Because if such difference existed, it was a loss suffered by the Chesapeake & Ohio, not from taking less than its published rates, but because it had received less as seller than the coal had cost. Second. That even if it had not the lawful right thus to impute the payment of the price of the coal, the Chesapeake & Ohio had, in fact, received much more for the coal than the price in money agreed on, because, at the time the verbal agreement to sell was made, the New Haven had a claim exceeding \$100,000 against the Chesapeake & Ohio, arising from a previous written contract to deliver the coal, which was to be extinguished by the completion of the delivery of the coal, and this caused that price largely to exceed the cost of the coal to the Chesapeake & Ohio, including its published rates. Averring that the prior contract was in itself void because it also embodied an agreement to take less than the published rates, and was discriminating, it was charged that the New Haven had entered into both agreements with the Chesapeake & Ohio, knowing that they were in violation of the interstate commerce law. The prayer was that the Chesapeake & Ohio and the New Haven be made parties; that both roads be enjoined, the one from further executing the verbal agreement to deliver coal, and the other from seeking to enforce it; that the Chesapeake & Ohio be enjoined from "accepting or receiving any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce carried by it," and be, moreover, enjoined from "doing anything whatever, whereby coal or any other property shall, by any device whatever, be transported * * * at a less rate than named in the tariffs published and filed by such carrier, as is required by the act to regulate commerce and acts amendatory thereof or supplementary thereto, or whereby any other advantage may be given or discrimination practised." And that the New Haven road "be enjoined and restrained from accepting or receiving any rebate, concession, or discrimination in respect of the transportation of any property in interstate or foreign commerce carried by it."

A preliminary restraining order was issued, conforming to the prayer of the petition. The Chesapeake & Ohio by its answer admitted that it had made, in the spring of 1903, a verbal agreement with the New Haven road for about 60,000 tons of Kanawha coal for the price alleged in the petition, to be transported by it to Newport News, and thence delivered by ocean transportation to the New Haven in Connecticut. It was admitted that the purchase price agreed to be paid was less than the market price of the coal, plus the published rates and the cost of transportation and delivery from Newport News to Connecticut, but it was averred that this was only apparently the case, because the contract to sell included the discharge of a debt of about

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\$100,000, arising from the previous written contract to which the petition referred. The validity of both the previous written contract and the later verbal agreement was averred. The right of the Chesapeake & Ohio to buy and sell coal, and to impute any loss on the sale of the coal to itself as dealer instead of to itself as a carrier, was averred. Both the original contract and the one of 1903 were averred to have been made in good faith, not with any intention to avoid the published rates, and it was charged that, at about the time the original contract was made, arrangements had been made by the railroad for a rate of transportation from Newport News to Connecticut which would have caused the contract price to be adequate to pay the market price of the coal and all other charges, including the published rates, but that, subsequently thereto, the persons with whom this contract for transportation was made had violated their agreement, and that by strikes the price of coal had advanced, and thereby the loss of \$100,000 to the Chesapeake & Ohio was occasioned.

The New Haven road, in its answer, asserted its good faith in making both the original contract and the verbal agreement. It alleged that by the original contract it was a mere purchaser of coal from the Chesapeake & Ohio, and not a shipper over that road; that the coal bought was intended for its own use in the operation of its railroad; that it had no knowledge of the price which the Chesapeake & Ohio would be obliged to pay for the coal, or the sum which it would cost that road to deliver it, and therefore had no knowledge that the total cost would not equal the market price of the coal, the cost of delivery, and the published rate of the Chesapeake & Ohio. It averred the validity of the agreement, the legality of the debt of \$100,000 which resulted from it, and charged that, taking that debt into consideration, the sum which it paid the Chesapeake & Ohio for the coal under the 1903 verbal agreement largely exceeded the market price and the cost of delivery, including the published rates of the Chesapeake & Ohio. It denied that there was any departure from the published rates or any discrimination, asserted that at the time the original contract was made the price was sufficient to have enabled the Chesapeake & Ohio to perform the contract without losing anything either as a seller or as a carrier, and that if, in execution of the contract, a condition arose where a loss was suffered by the Chesapeake & Ohio in either capacity, it was caused by subsequent events which could not affect the validity of the contract when made, and especially denied that in any way, directly or indirectly, had it knowingly lent itself to any discrimination, or any taking by the Chesapeake & Ohio of less than its published rates.

The case was heard on the testimony taken in the proceeding before the Commission and the documents forming a part of the same, and upon further documents and testimony stipulated by counsel.

For reasons to which we shall hereafter have occasion to

advert, the court held that, considering both the original contract and the verbal agreement of 1903, there was no violation of the provisions of the 2d and 6th sections of the act to regulate commerce, forbidding the taking of less than the published rates. [24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, p. 3154.] It, however, held that the contracts amounted to an undue discrimination and a violation of the 3d section of the act. The court, hence, permanently enjoined the Chesapeake & Ohio from discharging any obligation arising from the original contract of 1896, and from further executing or attempting to execute, in any manner whatever, directly or indirectly, the verbal agreement of 1903, and it permanently enjoined the New Haven from asserting or attempting to enforce any claim arising from the contract of 1896, or in any manner, directly or indirectly, attempting to enforce the verbal agreement of 1903. Thereafter the court denied a request made by the Commission, that the injunction be expanded so as, in general terms, to command the Chesapeake & Ohio perpetually to observe in the future its published rates.

The New Haven appealed. The Commission also prosecuted a cross appeal because of the refusal of the court to grant its prayer to make the injunction against the Chesapeake & Ohio general in its nature, and that company, in an elaborate and separate printed argument in its own behalf, assails the judgment below on the merits, and in effect asks its reversal on the merits.

It is apparent from the case as thus stated that, in order to decide the issues which arise, we may not confine our attention to the verbal agreement of 1903, the execution of which it was the immediate object of the proceeding to enjoin, but must consider the prior contract of 1896, since primarily the rights, if any, which arose under the verbal agreement, are inextricably involved in and dependent upon the contract of 1896. In other words, the controversy, as considered by the Commission on the inquiry by it conducted, and as decided below, and as here presented, involves an analysis of all the dealings under both contracts, and the legal rights, if any, which arose from them. We must, therefore, consider the subject in this aspect, and to do so we state at once the facts which are admitted or which are undisputably established, reserving such questions of fact as are in dispute for separate consideration when we approach the legal propositions which arise from the undisputed facts.

The Chesapeake & Ohio, chartered by the state of Virginia, operates a road which reaches both the New River and the Kanawha coal fields of West Virginia, and extends to Newport News. The New Haven, chartered by the state of Connecticut, operates a road principally situated in New England. On December 3, 1896, these two roads entered into a written contract, the one to sell and the other to buy, between July 1,

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1897, and July 1, 1902, not to exceed 2,000,000 gross tons of bituminous coal, to be taken from the line of the Chesapeake & Ohio road; deliveries to be made not exceeding 400,000 tons per annum. The price agreed upon was \$2.75 per gross ton, New Haven basis, settlement to be made monthly. The coal was to be delivered by the seller on the line of the New Haven. The contract is reproduced in the margin.†

The Chesapeake & Ohio, not in its own name, but through others who really, although not ostensibly, acted for it, made a contract with operators in the New River district of West Virginia, for the delivery to it of the coal to fulfil the contract which had been made with the New Haven. In consequence of failure of some of the operators to perform their part of the contract, changes were made at various times, which it is unnecessary to note. Deliveries of the coal were made to the New Haven as required up to the winter of 1900-1901, when, because of strikes and other difficulties, delivery ceased, and the New Haven bought coal in the open market and presented to the Chesapeake & Ohio a bill for the increased price which it had paid, and the Chesapeake & Ohio paid \$160,000 to cover such loss. Subsequently, in 1902, further strikes supervened

†Contract Made between the Chesapeake & Ohio Railway Company and the New York, New Haven, & Hartford Railroad Company.

Said Chesapeake & Ohio Railway Company, for the consideration hereinafter mentioned, hereby agrees to furnish to said railroad company not to exceed 2,000,000 gross tons of bituminous coal from its line in such quantities monthly as wanted from July 1, 1897, to July 1, 1902, without charge for demurrage. Deliveries to be made not exceeding 400,000 tons per annum.

And said Chesapeake & Ohio Railway Company further agrees that all said bituminous coal shall be of the best quality, first-class in every respect, and satisfactory to said railroad company, and said railway company has the right to terminate this contract at any time if said bituminous coal be of poor quality, or if its delivery be unnecessarily delayed.

And said Chesapeake & Ohio Railway Company further agrees to deliver all said bituminous coal to said railroad company in its bins at such ports upon its lines as required by the monthly requisitions of its purchasing agent.

In consideration of the faithful performance by the said Chesapeake & Ohio Railway Company of all its agreements herein contained, said railroad company agrees to pay for said bituminous coal at the rate of two and seventy-five one-hundredths dollars per gross ton. New Haven basis, settlement to be made monthly.

Said railway company has the right to cancel any and all portions of said quantity of bituminous coal remaining undelivered on July 1, 1902.

Witness the names of the parties hereto this, the 3d day of December, 1896.

Chesapeake & Ohio Railway Company,
By M. E. Ingalls, President.

The New York, New Haven, & Hartford Railroad Company,
By C. E. Mellen, Second Vice President.

For value received, I hereby guarantee that the Chesapeake & Ohio Railway Company shall not fail to deliver coal on account of strikes.
J. Pierpont Morgan.

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and deliveries again ceased, at a time when about 60,000 tons remained yet to be delivered. The New Haven again presented a bill for damages amounting to \$103,000. Thereupon the verbal agreement of 1903 was made, by which it was provided that the shortage of 60,000 tons upon the original contract might be discharged by delivery on the part of the Chesapeake & Ohio of that amount of coal from the Kanawha district at the contract price of \$2.75, and when this delivery was consummated it was agreed that the Chesapeake & Ohio would be absolutely relieved from the payment of the damage claim just referred to.

At the time this verbal agreement was made the contract price was, leaving out of view the claim for damages, inadequate to pay the market price, as admitted by the pleadings, of the coal plus the published rates of the Chesapeake & Ohio to Newport News, and the charges thence to the point of delivery. To put itself in a position to carry out the agreement, an individual who represented the Chesapeake & Ohio made contracts in his own name with the operators in the Kanawha district to furnish the desired coal. Without stopping to state the particular methods of accounting by which the result was accomplished, it is indisputable that the Chesapeake & Ohio bore the loss arising from the difference between the contract price, the price of the coal at the mines, the published rate to Newport News, and the cost of transporting thence to the point of delivery.

Undoubtedly long prior to the making of the first contract the Chesapeake & Ohio, besides its business as a carrier, bought and sold coal. This business was carried on by the company from about 1874 up to the time of the making of the contract of 1896, as testified by the president who made that contract, as follows:

"The coal was handled by a separate and distinct department of the railway company, the mine operators delivering for an agreed price at the mines to the coal agent of the railway company all coal mined by them, the net result realized from the selling price of the coal representing the freight earned by the railway company."

And the same official testified that he made the contract of 1896 as a continuation of this system.

In 1895, however, the state of West Virginia passed "An Act to Prevent Railroad Companies from Buying or Selling Coal or Coke and to Prevent Discrimination." The 1st section of this act made it unlawful for any railroad corporation to engage directly or indirectly in the business of buying and selling coal or coke. In consequence of this act, prior to the making of the contract of 1896, the coal department of the railroad was abolished. And it was the existence of the West Virginia statute which caused the Chesapeake & Ohio, when it contracted with operators in West Virginia to procure as to

both contracts the coal for delivery to the New Haven, to do so not in its own name, but through another.

Before applying to these undisputed facts the legal question arising for decision, we must determine a question of fact as to which there is some dispute; that is, was the price at which the Chesapeake & Ohio contracted in 1896 to sell the coal to the New Haven sufficient to pay the cost of the coal at the mines, as well as the expense of delivery, including the published freight rate? Without stopping to go into the evidence, we content ourselves with saying that we think the court below correctly held that the price was not adequate to accomplish these purposes, and that from the inception of delivery under the contract, and during the whole period thereof, except for a brief time, caused by lowering of the freight rates, the contract price was inadequate to net the railroad its proper legal tariff.

We are brought, then, to determine whether the contract made in 1896 for the 2,000,000 tons of coal was void because in conflict with the act to regulate commerce and its amendments. In approaching the consideration of the act to regulate commerce, we, for the moment, put out of view the provisions of the West Virginia statute, and its influence upon the validity of the contract made in West Virginia for the purpose of acquiring the coal which the Chesapeake & Ohio had obligated itself to deliver. We shall also assume, for the purpose of the inquiry, that the Chesapeake & Ohio, although not expressly authorized, was not prohibited by its Virginia charter from buying and selling and transporting the coal in which it dealt. The case, therefore, will be considered solely in the light of the operation and effect of the provisions of the act to regulate commerce, and we shall not direct our attention to expressly determining whether the assertion by a carrier of a right to deal in the products which it transports would not be so repugnant to the general duty resting on the carrier as to cause the exertion of the power to deal in the products which it transports to be unlawful, irrespective of statutory restrictions.

The question, therefore, to be decided is this: Has a carrier engaged in interstate commerce the power to contract to sell and transport in completion of the contract the commodity sold, when the price stipulated in the contract does not pay the cost of purchase, the cost of delivery, and the published freight rates?

The previous decisions of this court concerning the interstate commerce act do not afford much aid in determining this question. This is the case, because, although that act was adopted in 1887, and questions concerning the import of the act have been often here, such questions have not generally involved the operation and effect of the act concerning the command that published rates be adhered to, and the prohibitions, against discrimination, favoritism, or rebates, but have

mainly concerned the meaning of the act in other respects; that is, involved deciding whether powers asserted as to other subjects were vested by the act in the Interstate Commerce Commission.

There are several leading cases decided by the Commission, which are relied upon by the two railroads, directly relating to the question we have stated, but, as we shall have occasion hereafter to weigh their import, we shall not now pause to analyze and apply them.

It cannot be challenged that the great purpose of the act to regulate commerce, whilst seeking to prevent unjust and unreasonable rates, was to secure equality of rates as to all, and to destroy favoritism, these last being accomplished by requiring the publication of tariffs, and by prohibiting secret departures from such tariffs, and forbidding rebates, preferences, and all other forms of undue discrimination. To this extent and for these purposes the statute was remedial and is, therefore, entitled to receive that interpretation which reasonably accomplishes the great public purpose which it was enacted to subserve. That a carrier engaged in interstate commerce becomes subject as to such commerce to the commands of the statute, and may not set its provisions at naught whatever otherwise may be its power when carrying on commerce not interstate in character, cannot in reason be denied. Now, in view of the positive command of the 2d section of the act, that no departure from the published rate shall be made, "directly or indirectly," how can it in reason be held that a carrier may take itself from out the statute in every case by simply electing to be a dealer and transport a commodity in that character? For, of course, if a carrier has a right to disregard the published rates by resorting to a particular form of dealing, it must follow that there is no obligation on the part of a carrier to adhere to the rates, because doing so is merely voluntary. The all-embracing prohibition against either directly or indirectly charging less than the published rates shows that the purpose of the statute was to make the prohibition applicable to every method of dealing by a carrier by which the forbidden result could be brought about. If the public purpose which the statute was intended to accomplish be borne in mind, its meaning becomes, if possible, clearer. What was that purpose? It was to compel the carrier, as a public agent, to give equal treatment to all. Now if, by the mere fact of purchasing and selling merchandise to be transported, a carrier is endowed with the power of disregarding the published rate, it becomes apparent that the carrier possesses the right to treat the owners of like commodities by entirely different rules. That is to say, the existence of such a power in its essence would enable a carrier, if it chose to do so, to select the favored persons from whom he would buy, and the favored persons to whom he would sell, thus giving such persons an

advantage over every other, and leading to a monopolization in the hands of such persons of all the products as to which the carrier chose to deal. Indeed, the inevitable result of the possession of such a right by a carrier would be to enable it, if it chose to exercise the power, to concentrate in its own hands the products which were held for shipment along its line, and to make it, therefore, the sole purchaser thereof and the sole seller at the place where the products were to be marketed; in other words, to create an absolute monopoly. To illustrate: If a carrier may, by becoming a dealer, buy property for transportation to a market and eliminate the cost of transportation to such market, a faculty possessed by no other owner of the commodity, it must result that the carrier would be in a position where no other person could ship the commodity on equal terms with the carrier in its capacity of dealer. No other person owning the commodity being thus able to ship on equal terms, it would result that the owners of such commodity would not be able to ship, but would be compelled to sell to the carrier. And as, by the departure from the tariff rates, the person to whom the carrier might elect to sell would be able to buy at a price less than any other person could sell for, it would follow that such person, so selected by the carrier, would have a monopoly in the market to which the goods were transported. And that the result arising from an admission of the asserted power of the carrier as a dealer to disregard the published rates conduces immediately, and not merely remotely, to the production of the injurious results stated, is not only demonstrated by the very nature of things, but is established to be the case by the facts indisputably shown on this record. For here it is unquestioned that the Chesapeake & Ohio, as a result of its being a dealer, had become, long prior to the adoption of the interstate commerce law, and continued to be thereafter, up to the passage of the West Virginia statute prohibiting a carrier from dealing in coal, virtually the sole purchaser and seller of all the coal produced along the line of its road. That this result was not merely accidental, but was in effect engendered by the power of the carrier to deal and transport a commodity, is illustrated by the case of *Atty. Gen. v. Great Northern R. Co.*, 29 L. J. Ch. N. S. 794. In that case Vice Chancellor Kindersley was called upon to determine whether dealing in coal by the railway company was illegal, because incompatible with its duties as a public carrier and calculated to inflict an injury upon the public. In deciding that the act of Parliament granting the charter to operate the railway implied a prohibition against the company's engaging in any other business, the reason for the rule was thus expressed (p. 798):

"These large companies, joint-stock companies generally, for whatever purpose established, and more particularly railway companies, are armed with powers of raising and possessing

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large sums of money,—large amounts of property,—and if they were to apply that money, or that property, to purposes other than those for which they were constituted, they might very much injure the interests of the public in various ways.”

Illustrating the danger to the public, as established by the case before him, the Vice Chancellor said (p. 799):

“Here we find this company, having the traffic from the north of England, where the great coal fields are (at least, some of the principal coal fields), supplying the country with coal, or capable of supplying it; this company buys the coal, which gives to the company an interest in checking, as much as possible, those who will not deal with them; and it is quite clear that it is possible, by the mode in which this company may (I will not say has)—but by the mode in which this company may exercise such powers as either it has or assumes to have—this company may get into their hands the traffic; that is, the dealing in all the coal in the large districts supplying coal to the country. They have, to a considerable extent, done so, and there is no reason why it should not go on progressing. I observe that in the eight [?] years from 1852 to 1857, inclusive, the amount of their coal business has increased from 73,000 tons to 794,000 tons; and there is no reason, as the affidavits show, why they should not—there is great danger that they may—get into their hands the entire business in the coal of all that district of country. If they can do that with regard to coal, what is to prevent their doing it with regard to every species of agricultural produce all along the line? Why should they not become purchasers of corn, of all kinds of beasts, and of sheep, and every species of agricultural produce, and become great dealers in the supply of edibles to the markets of London and why not every other species of commodity that is produced in every part of the country from which or to which their railway runs? I do not know where it is to stop, if the argument on the part of the company is to prevail. There is, therefore, great detriment to the interests of the public, for this reason, taking merely the article of coal.”

It is apparent that the construction of the statute which is now claimed by the carriers would, if adopted, not only destroy its entire remedial efficacy, but would cause the provisions of the statute to accentuate and multiply the very wrongs which it was enacted to prevent.

Without a statutory requirement as to publication of rates and the imposition of a duty to adhere to the rates as published, individual action of the shippers, as between themselves and in their dealings with the carrier, would have full play, and thereby every shipper would have the opportunity to procure such concessions as might result from favoritism or other causes. Interpreting the prohibitions of the statute as it is contended they should be, it would follow that every individual would be bound by the published tariff, and the carrier alone would be free to

disregard it. Thus the statute, whilst subjecting the public to the prohibitions, would exempt the carrier, and would thereby enormously increase the opportunities of the latter to do the wrongs which the statute was enacted to prevent.

And the considerations previously stated serve also to demonstrate that the prohibitions of the act to regulate commerce concerning "undue or unreasonable preference or advantage," "undue or unreasonable prejudice or disadvantage," and unjust discrimination," are in conflict with the asserted right of a carrier to become a dealer in commodities which it transports, and, as such dealer, to sell at a price less than the cost and the published rates. Certain also is it, when the reasons previously stated are applied to those prohibitions of the statute, the possession of the power by a carrier to deal in merchandise and to sell and transport at less than published rates would not only destroy the remedy intended to be afforded by the provisions in question, but would cause the statute to fructify the growth of the wrongs which it was intended to extirpate. In a general sense the considerations which we have previously stated, moreover, dispose of all the contentions urged at bar to establish the right of the carrier to become a dealer under the circumstances stated. Even although it may give rise to some repetition, we more particularly notice the various contentions.

(a) It is said that when a carrier sells an article which it has purchased and transports that article for delivery, it is both a dealer and a carrier. When, therefore, the price received for the commodity is adequate to pay the published freight rate and something over, the command of the statute as to adherence to the published rates is complied with, because the price will be imputed to the freight rate, and the loss, if any, attributed to the company in its capacity as dealer, and not as a carrier. This simply asserts the proposition which we have disposed of, that a carrier possesses the power, by the form in which he deals, to render the prohibitions of the act ineffective, since it implies the right of a carrier to shut off inquiry as to the real result of a particular transaction on the published rates, and thereby to obtain the power of disregarding the prohibitions of the statute.

(b) It is said that, as in the case in hand, it is shown that there was no intention on the part of the carrier in making the sale of the coal to violate the prohibitions of the statute, and, on the contrary, as the proofs show an arrangement made by the carrier for transporting the coal from Newport News to Connecticut, which, if it had been carried out, would have provided for the full published rate, therefore an honest contract made by the carrier should not be stricken down because of things over which the carrier had no control. The proposition involves both an unfounded assumption of fact and an unwarranted implication of law. It is true the court be-

low found that the proof did not justify the inference that the Chesapeake & Ohio had, in 1896, made the contract to sell the coal to the New Haven with the purpose of avoiding a compliance with the published rates. But in this conclusion of fact we cannot agree. Whilst it may be that the proof establishes that the contract for the sale of coal was not made as a mere device for avoiding the operation of the statute, we think the proof leaves no doubt that, in making the contract in question, the Chesapeake & Ohio was wholly indifferent to and did not concern itself with, the prohibitions of the statute, of which, of course, it must be assumed to have had full knowledge. As we have seen, the president of the Chesapeake & Ohio, by whom the corporation was represented in making the contract, expressly testified that from the beginning that corporation had pursued the policy of acquiring all the coal mined on its line, and sold it, relying upon the net result of such sales for its freight compensation, and that the particular contract was made in continuation of that policy. We find it impossible to conclude, from the proof, that the Chesapeake & Ohio could have made a contract for so large an amount of coal, to be delivered over so long a period, without taking into view the existing prices and the cost necessarily to be occasioned by the delivery of the coal, if the full published freight rates were to be realized. Indeed, the proof leaves no doubt upon our minds that, in making the contract, the Chesapeake & Ohio sought to accomplish results which it deemed beneficial by means which it considered effectual, even although resort to such means was prohibited by the interstate commerce act. In other words, we think it is established beyond doubt that, desiring to stimulate the production of coal along its line, and thereby, as it conceived, to increase the carriage of that commodity, and to benefit the railroad and those living along its line by the reflex prosperity which it was deemed would arise from giving a stimulus to an industry tributary to the railroad, the Chesapeake & Ohio bought and sold the coal without reference to whether the net result to it would realize its published rates. And it would seem that this means of stimulating the industry in question was resorted to instead of attempting to bring about the same result by a lowering of the published rates, because to have so done would have engendered disparity between coal rates and the tariff on all the other articles contained in the same classification, and would besides have caused other and competing roads to make a similar reduction on the published rates, and thereby would have frustrated the very advantage to itself and those along its lines which the Chesapeake & Ohio deemed it was bringing about by the method pursued. That is to say, we think it is shown that the mode of dealing adopted was simply the result of a disregard by the Chesapeake & Ohio of the economic conceptions upon which the interstate commerce law rests, and a substitution in their stead

of the conceptions of the Chesapeake & Ohio as to what was best for itself and for the public. Further, as the prohibition of the interstate commerce act is ever operative, even if the facts established that at the particular time the contract was made, considering the then cost of coal and other proper items, the net published tariff of rates would have been realized by the Chesapeake & Ohio from the contract, which is not the case, it is apparent that the deliveries under the contract came under the prohibition of the statute whenever, for any cause, such as the enhanced cost of the coal at the mines, an increase in the cost of the ocean carriage, etc., the gross sum realized was not sufficient to net the Chesapeake & Ohio its published tariff of rates. This must be the case in order to give vitality to the prohibitions of the interstate commerce act against the acceptance at any time by a carrier of less than its published rates. We say this because we think it obvious that such prohibitions would be rendered wholly ineffective by deciding that a carrier may avoid those prohibitions by making a contract for the sale of a commodity stipulating, for the payment of a fixed price in the future, and thereby acquiring the power during the life of the contract to continue to execute it, although a violation of the act to regulate commerce might arise from doing so. Besides, all the contentions just noticed proceed upon the mistaken legal conception that the application of the statutory prohibitions depends not upon whether the effect of the acts done is to violate those prohibitions, but upon whether the carrier intended to violate the statute.

(c) It is urged that if the requirement of the act to regulate commerce as to the maintenance of published rates and the prohibitions of that act against undue preferences and discriminations be applied to a carrier when engaged in buying and selling a commodity which it transports, the substantial effect will be to prohibit the carrier from becoming a dealer when no such prohibition is expressed in the act to regulate commerce, and hence a prohibition will be implied which should only result from express action by Congress. Granting the premise, the deduction is unfounded. Because no express prohibition against a carrier who engages in interstate commerce becoming a dealer in commodities moving in such commerce is found in the act, it does not follow that the provisions which are expressed in that act should not be applied and be given their lawful effect. Even, therefore, if the result of applying the prohibitions as we have interpreted them will be practically to render it difficult, if not impossible, for a carrier to deal in commodities, this affords no ground for relieving us of the plain duty of enforcing the provisions of the statute as they exist. This conclusion follows, since the power of Congress to subject every carrier engaging in interstate commerce to the regulations which it has adopted is undoubted.

But it is in effect said, conceding this to be true as an original

question, the prohibitions of the act ought not now to be interpreted as applying to a carrier who is a dealer in commodities, because of an administrative construction long since given to the act by the interstate commerce commission, the body primarily charged with its enforcement, and which has become a rule of property, affecting vast interests, which should not be judicially departed from, especially as such construction, it is asserted, has been impliedly sanctioned by Congress by frequently amending the act without changing it in this particular.

Passing, for the present, the legal conclusion, let us first ascertain whether the premise itself is well founded. The two rulings of the Interstate Commerce Commission upon which the premise is based are *Haddock v. Delaware, L. & W. R. Co.*, 4 I. C. C. Rep. 296, 3 Inters. Com. Rep. 302, and *Coxe Bros. v. Lehigh Valley R. Co.*, 4 I. C. C. Rep. 535, 3 Inters. Com. Rep. 460, decided respectively in 1890 and 1891.

Without going into detail, we content ourselves with saying that in both of the cases complaints were made to the Interstate Commerce Commission concerning the defendant railroads, and it was charged that whilst acting as common carriers they were dealing in coal, and as a result violating the prohibitions of the interstate commerce act as to rates and undue preferences and discriminations. It was shown in both cases that the carriers, prior to the adoption of the interstate commerce act, were authorized by their charters or legislative authority to carry on both the business of mining and selling the coal so mined, and transporting the same to market. Indeed, it was found in both cases that the functions of producing and transporting, as authorized, were so interblended that it was impossible to separate one from the other. Whilst it is true that in both of the cases it was also shown that the carriers bought, sold, and transported some coal which was not produced in the mines which they owned, this fact was evidently treated, in view of the other circumstances of the case, as of minor importance, since the commingled powers of producing, selling, and transporting were alone made the basis of the conclusion reached by the Commission as to the character of relief which could be afforded. Solely in view of the lawful power of the carriers to mine, sell, and transport, existing before the passage of the act to regulate commerce, the Commission decided that its authority, under that statute and under the circumstances of the case, was confined to compelling the exaction of rates which were just and reasonable. The fact that the rulings in the two cases just referred to were solely placed upon the peculiar powers of the defendant corporations possessed by them prior to the passage of the interstate commerce act was pointed out by the Commission in *Re Alleged Unlawful Rates*, 7 I. C. C. Rep. 33. In that case, in deciding that the defendant carrier was without power to purchase grain for the purpose of securing the right to transport it, and thus evade the law which would

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have applied to its transportation had it been owned by any other party, the Commission, in distinguishing the case before it from the Haddock and Coxe Bros. Cases, said (p. 38):

"Those cases are in no respect similar to this. In both the common carrier was also the owner of extensive coal fields, and indeed it had become a common carrier largely for the purpose of transporting the product of those mines to market. This state of things existed before the passage of the act, and had no reference to the act. Unless the carrier was permitted to transport its coal, the result would be in effect the confiscation of its property; and to order it to charge itself with a particular rate would merely result in a matter of bookkeeping. Under these circumstances it was held that the only remedy was to inquire whether the rate charged the complainant was a reasonable one."

Now, without at all intimating that, as an original question, we would concur in the view expressed in the case last cited, that to have applied the act to regulate commerce, under proper rules and regulations for the segregation of the business of producing, selling, and transporting, as presented in the Haddock and Coxe Bros. Cases would have been confiscatory, and without reviewing the rulings made by the Interstate Commerce Commission in those cases, and adhered to by that body during the many years which have followed those decisions, we concede that the interpretation given by the Commission in those cases to the act to regulate commerce is now binding, and, as restricted to the precise conditions which were passed on in the cases referred to, must be applied to all strictly identical cases in the future; at least, until Congress has legislated on the subject. We make this concession because we think we are constrained to do so, in consequence of the familiar rule that a construction made by the body charged with the enforcement of a statute, which construction has long obtained in practical execution, and has been impliedly sanctioned by the re-enactment of the statute without alteration in the particulars construed, when not plainly erroneous, must be treated as read into the statute. Especially do we think this rule applicable to the case in hand, because of the nature and extent of the authority conferred on the Commission from the beginning concerning the prohibitions of the act as to rebates, favoritism, and discrimination of all kinds, and particularly in view of the repeated declarations of the court that an exertion of power by the Commission concerning such matters was entitled to great weight, and was not lightly to be interfered with. The concessions thus made, however, are wholly irrelevant to the case before us. This follows since the Chesapeake & Ohio was, neither by its charter nor by legislative grant existing at the time of the adoption of the act to regulate commerce, possessed of the commingled attributes of carrier and producer, which was the controlling consideration in the decisions made in the Haddock and Coxe Bros. Cases.

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Concluding, therefore, that both the contracts made by the Chesapeake & Ohio with the New Haven were contrary to public policy, and void because in conflict with the prohibitions of the act to regulate commerce, it obviously follows that such contracts were not susceptible of being enforced by the New Haven, and afforded no legal basis for a claim of the New Haven against the Chesapeake & Ohio, and therefore the court below was correct in so deciding.

This leaves only for consideration the question raised by the cross appeal of the Interstate Commerce Commission. That proposition is thus stated in the first of the assignments of error filed on behalf of the Commission:

"That the circuit court of the United States for the western district of Virginia, after finding that the claim of the New York, New Haven, & Hartford Railroad Company against the Chesapeake & Ohio Railway Company for \$103,910.69, asserted as damages arising from a partial nonperformance by said railway company of a contract of December 3, 1896, set out in the record, is, as to the whole of said claim and interest thereon, an illegal and unenforceable claim, and after finding that the verbal agreement between said companies, made in April, 1903, and set out in said record, whereby said railway company undertook to furnish to said railroad company 59,966 tons of coal to be transported from West Virginia to Newport News, Virginia, over the lines of said railway company, and thence transported by vessels to certain New England ports, said coal to be delivered at said ports at the price of \$2.75 per ton, New Haven basis, to be an invalid and illegal agreement; that said court merely enjoined and restrained the said Chesapeake & Ohio Railway Company, its officers, agents, and employees from, in any manner, direct or indirect, executing or performing, or attempting to execute or perform, either said contract of December 3, 1896, or said agreement of April, 1903, and from in any manner discharging or satisfying any obligation or seeming obligation arising from said agreements or either of them, or arising from any arrangement or agreement made in lieu of said agreements, or either of them; whereas said court should have further enjoined and restrained the Chesapeake & Ohio Railway Company from giving to said railroad company, or to any other person, firm, or company, any undue or unreasonable advantage or preference, and should further have restrained and enjoined the Chesapeake & Ohio Railway Company from transporting coal from one state to or through any other state for the New York, New Haven, & Hartford Railroad Company, or for any firm, person, or company, at a less rate than the duly established freight rate of the said railway company in force at the time, and from further failing to observe its published tariffs, or from giving to the said New York, New Haven, & Hartford Railroad Company, or to any person, firm, or company, in any manner whatsoever, any undue or unreasonable prefer-

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ence or advantage; and said decree, entered by the court on the 19th day of February, 1904, in addition to the provisions thereof, should have enjoined and restrained the New York, New Haven, & Hartford Railroad Company and its officers and agents from seeking or accepting, in any manner, any direct or indirect rebate of the duly established freight rates of the Chesapeake & Ohio Railway Company on any interstate commerce, and from seeking or accepting in any manner from said railway company any undue or unreasonable preference or advantage."

The contention, therefore, is that, whenever a carrier has been adjudged to have violated the act to regulate commerce in any particular, it is the duty of the court, not only to enjoin the carrier from further like violations of the act, but to command it in general terms not to violate the act in the future in any particular. In other words, the proposition is that, by the effect of a judgment against a carrier concerning a specific violation of the act, the carrier ceases to be under the protection of the law of the land, and must thereafter conduct all its business under the jeopardy of punishment for contempt for violating a general injunction. To state the proposition is, we think, to answer it. *Swift & Co. v. United States*, 196 U. S. 375, 49 L. Ed. 518, 25 Sup. Ct. Rep. 276. The contention that the cited case is inapposite because it did not concern the act to regulate commerce, but involved a violation of the antitrust act, we think is also answered by the mere statement of the proposition. The requirement of the act to regulate commerce, that a court shall enforce an observance of the statute against a carrier who has been adjudged to have violated its provisions, in no way gives countenance to the assumption that Congress intended that a court should issue an injunction of such a general character as would be violative of the most elementary principles of justice. The injunction which was granted in the case of *Re Debs*, 158 U. S. 564, 39 L. Ed. 1092, 15 Sup. Ct. Rep. 900, was not open to such an objection, as its terms were no broader than the conspiracy which it was the purpose of the proceeding to restrain. To accede to the doctrine relied upon would compel us, under the guise of protecting freedom of commerce, to announce a rule which would be destructive of the fundamental liberties of the citizen.

As the court below did not decide that the 2d and 6th sections of the act, relating to the maintenance of rates, had been violated, the injunction by it issued was not made as directly responsive to the commands of the statute on that subject as we think it should have been. We, therefore, conclude that the injunction below should be modified and enlarged by perpetually enjoining the Chesapeake & Ohio from taking less than the rates fixed in its published tariff of freight rates, by means of dealing in the purchase and sale of coal. And, as thus modified, the decree below is affirmed.

BOLING v. ST. LOUIS & S. F. R. Co.

(Supreme Court of Missouri, Division No. 2, June 6, 1905.)

[88 S. W. Rep. 35.]

Appeal—Constitutional Question.—An appeal, having fairly raised a constitutional question, and having been taken before the question was settled by the Supreme Court, will be retained, and not sent to the Court of Appeals.

Carriers—Special Rate Ticket.*—The condition in a railroad ticket sold at a reduced rate that it will not be good for return passage unless the holder identifies himself as the original purchaser to the ticket agent at destination on any day within the limit of 21 days from date of sale, and that it will then be good for continuous return passage, which shall be commenced on date of execution, as punched in the right-hand margin, is binding, so that the purchaser having, on arriving at her destination, two days after purchase of the ticket, been identified by the ticket agent at that place, who then attested her signature and dated it as of that date, the ticket is not good for a return passage commencing several days thereafter, though within the limit of 21 days.

Same—Expiration of Time Limit.—The acceptance of a railroad ticket by one of the connecting carriers over whose lines it provides for passage does not require another of such carriers to accept it, the time for using it having expired.

Same—Rights of Purchaser.†—The fact that one buying what she knew was a special-rate railroad ticket did not read it does not relieve her of the effect of a stipulation, plainly printed on its face, that return passage should be commenced on the date that she was identified, and the ticket was stamped and punched for return passage.

Same—Expulsion of Passenger.‡—Though a railroad ticket presented by a passenger does not entitle her to passage, so that, on her being informed of its invalidity and refusing to pay fare, the conductor may remove her, the company is liable for compensatory damages for his using unnecessary and insulting language to her, injuring her feelings and humiliating her.

Same.—The leaving of a train by a passenger whose ticket the conductor had refused to accept, in obedience to the conductor's command to the porter to see that she got off at the next station, is an ejection.

Same.—For a passenger, whose ticket the conductor had refused to accept, to leave the train of her own accord, and against his advice that she remain, and allow him to hold her baggage check as security for passage, to be paid if the company agreed with him that the ticket was not good, is not an ejection.

Same—Ticket Agent—Mistake.**—Defendant sold a ticket over its

*For the authorities in this series on the subject of the validity of stipulation fixing time for expiration of passenger ticket, see foot-notes appended to *Elliott v. Southern Pac. Co.* (Cal.), 18 R. R. R. 52, 41 Am. & Eng. R. Cas., N. S., 52.

†For the authorities in this series on the subject of the validity of stipulation requiring identification of purchaser of return ticket, see foot-note appended to *Baltimore & O. S. W. Ry. v. Hudson* (Ky.), 12 R. R. R. 78, 35 Am. & Eng. R. Cas., N. S., 78.

‡As to whether acceptance of a passenger ticket includes assent to its printed conditions, see foot-note appended to *Saunders v. Southern Ry. Co.* (C. C. A.), 11 R. R. R. 596, 34 Am. & Eng. R. Cas., N. S., 596.

**See foot-notes appended to *Yazoo & M. V. R. Co. v. Mattingly* (Miss.), 14 R. R. R. 48, 37 Am. & Eng. R. Cas., N. S., 48; foot-notes appended to *Illinois Cent. R. Co. v. Winslow* (Ky.), 14 R. R. R. 432, 37 Am. & Eng. R. Cas., N. S., 432.

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road and other roads to C. and return, providing that in selling the ticket it acted as agent, and was not responsible beyond its line, and that the return passage must be commenced the day that the passenger identified herself to the ticket agent at C., and he punched the ticket. Held, that the ticket agent at C. was not the agent of defendant, so as to make it responsible for his mistake in punching it on her arrival, and telling her that she could use it on a later day.

Appeal from Circuit Court, Greene County; Jas. T. Neville, Judge.

Action by Julia M. Boling against the St. Louis & San Francisco Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

L. F. Parker and *J. T. Woodruff*, for appellant.

Vaughan & Coltrane, for respondent.

GANTT, J. This is an action by Mrs. Julia M. Boling, who resides at Claremore, Ind. T., against the defendant company for damages for being ejected from one of its trains at Pacific, Mo., April 6, 1900. The petition alleges the purchase of a railroad ticket from the defendant company at Joplin, Mo., entitling her to passage from Joplin to Chickamauga, Ga., and return, and then alleges that "before beginning her return passage said ticket was duly signed by her, and her signature witnessed and the same countersigned by the agent of the defendant's connecting line at Chickamauga, Georgia, and that at the times hereinafter stated said ticket entitled plaintiff to return over said lines of railway to Joplin, Missouri; that she began her return passage on the 5th day of April, 1899, and on the night of April 6, 1899, at St. Louis, Mo., she took passage upon and entered one of the defendant's trains leaving St. Louis, the same being a regular passenger from said city of St. Louis to Joplin, Missouri; that near a station of defendant's said railway, called 'Pacific,' and while she was rightfully on said train, the conductor in charge thereof rudely and wrongfully deprived her of said ticket and the use thereof by taking it up and denying her transportation thereon, and wrongfully, willfully, and insultingly expelled and ejected her from said train; that in consequence she was compelled to use the small amount of money she had to obtain other transportation to her home, and, being among strangers, was compelled to go without food the next morning, and was put to great expense, trouble, and inconvenience, was injured in body and mind, and suffered great shame and humiliation, on account of all of which plaintiff says she has been damaged in the sum of five thousand dollars." In its answer the defendant admits it is a railroad, and owns and operates the line of railways between St. Louis and Joplin, and is engaged in carrying passengers for hire thereon, but denies each and every other allegation in said petition contained.

The evidence, in substance, was: That plaintiff, a married lady, was a resident of the town of Claremore, Ind. T., on March 20, 1900, and on that date went to Joplin, Mo. She

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desired to go to Chickamauga, Ga., to visit her sister, and bring back with her a little niece, five or six years old. That she learned that the Frisco road, the defendant herein, had on sale at Joplin, Mo., excursion tickets from Joplin to Chickamauga and return. That she endeavored to obtain one of these tickets from the agent at Claremore, but was unable to do so, and, desiring to see Joplin, she went to that city, and there purchased one of those excursion tickets from Joplin to Chickamauga and return. The ticket was sold at a reduced rate. This ticket, in large type, reads:

"Good for one first-class passage to Chickamauga, Georgia, and return, when officially dated, stamped and presented with coupons attached subject to the following contract:

"(1) In selling this ticket and carrying baggage hereon, this company acts as agent and is not responsible beyond its own line.

"(2) This ticket will be good to leave starting point only on date of sale, as stamped thereon. It will then be good for going passage within fifteen days from date of sale as per final going limit punched in left hand margin by selling agent.

"(3) Stop-overs will be allowed on going passage within the going of fifteen days. No stop-overs will be allowed on return trip.

"(4) It will not be good for return passage unless the holder identifies himself as the original purchaser to the satisfaction of the ticket agent at destination point by signature or otherwise, on any day within final limit of 21 days from date of sale, as stamped on back or written below. It will then be good for continuous return passage of the original purchaser, which shall be commenced on date of execution, as punched in right-hand margin hereof."

The ninth clause is: "Unless all the conditions on this ticket are fully complied with, it shall be void." "I hereby agree to all the conditions of the above contract. [Signed] J. M. Boling, Purchaser. Witness: J. A. Glassey, Selling Agent. Date of sale March 20th, 1900."

The plaintiff commenced her journey from Joplin on the 20th of March, 1900, and arrived in Chickamauga, Ga., on the 22d. as indicated by punched marks on the left-hand margin of the ticket. On arriving at Chickamauga, Ga., on the 22d of March, and intending to visit relatives some 12 miles in the country, and near Kingston, on another railroad, leading into Chattanooga, Tenn., and not wishing to return by way of Chickamauga, she inquired of the station agent of the Chickamauga, Rome & Southern Railroad (the last road over which she traveled to Chickamauga) if she could be identified and have her ticket stamped by him at that time so that she would not have to return to Chickamauga for that purpose when she got ready to return to her home, in the Indian Territory. He assured her that she could, and thereupon she signed the ticket before the ticket

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agent at that place, and he attested her signature, and dated the same March 22, 1900. This agent at Chickamauga was advised that she had just arrived, because she called on him for her baggage, which it appears had not arrived, but had been left in Chattanooga, when, at her request, he had the baggage sent from Chattanooga to Kingston direct on another road. When plaintiff got ready to return to her home, she did not return to Chickamauga, but started from Kingston, and went to Chattanooga. She began to use her ticket for return passage between Chattanooga and St. Louis, and it was honored by the other railroads until she reached St. Louis, on April 5, 1900. On the evening of April 6th, plaintiff purchased of the Pullman Palace Car Company a sleeping-car berth for herself and her sister Miss Davis, and the little niece, and was allowed to pass through the gate at the Union Station on the presentation of her ticket, and into the sleeping car attached to one of defendant's passenger trains, bound for Monett, Mo. The conductor of this train was John Gillis. After the train started, and near Valley Park, a station some 17 miles west of St. Louis, the conductor, Gillis, began taking up tickets in this sleeping car. Plaintiff's sister Miss Davis had her own and the plaintiff's said return ticket, and, when the conductor came to her, she handed both to him, and thereupon he pronounced the ticket invalid. And at this point there is a conflict in the testimony as to what occurred between plaintiff and the conductor. The evidence of the plaintiff tends to show that after the conductor had seen plaintiff's ticket he insinuated that she had not come by it properly; that he refused to make any effort to find out whether the ticket was good; that he disputed the plaintiff's words; that his manner was rude and insulting, and he wound up by confiscating the ticket, and directing his porter to see that the plaintiff got off the train at Pacific; that when they reached Pacific the porter came and got her grips, and told her this was the place to get off, and that she, her sister, and little niece got off the train and went into the station at Pacific, and plaintiff purchased a ticket to Monett, and she and her sister and little girl took the next train, and arrived at Monett at the same time and made the same connections for her home in the Territory that she would have made, had she remained on the train on which she first started. On the part of the defendant, the conductor, Gillis, testified that he refused to take the ticket because it had expired according to the limitations printed thereon, and that when he took it he gave her a receipt, and explained to her fully that the rules of the company prevented him from permitting her to ride on the ticket, and that she must pay her fare, and, if she did not have the money to do so, he would take her baggage check as security, and send it to the general office with the ticket, with an explanation, and that, if it was all right, on reaching her destination, at Claremore, she could get her baggage, and, if it was not all right, she could call at the station

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in Claremore and pay the amount of fare and get her baggage; that he endeavored to persuade her to do this, and then left her, and went to the front of the train to finish taking up tickets, and supposed she would reconsider and pay her fare, though she had positively refused to do so; that he was at the front end of the car when they reached Pacific, and did not see her leave the train, and did not know that she and her sister had left the train until he went into the sleeper after the train left Pacific; that he did not direct the porter to see that she got off at Pacific; and that the train porter did not assist her in getting off, and had nothing whatever to do with the matter. As to this latter statement the conductor is corroborated by the Pullman conductor, who testified that he told her that, if she intended to get off, this was Pacific, and, upon being informed by her that she intended to get off and take the next train, he and the Pullman porter assisted them off the train, the porter carrying the baggage, and he the little girl; that neither Conductor Gillis nor the train porter were present at the time plaintiff left the train; that he refunded or transferred her Pullman ticket, so she would have the full benefit of it on the next train. The conductor denied that he used any rude or insulting language to the plaintiff. Miss Davis testified that when the controversy was going on between her sister, the plaintiff, and the conductor, she went over to where her sister sat, and her sister said to her, "The conductor says my ticket is no good, and wants to make me pay fare," and thereupon the conductor turned to witness and began to explain about scalpers—how expert they had become in fixing up tickets and fooling the conductors—and she said to him, "That is a scalper's ticket?" "He said, 'Yes, madam;' and I says, 'So you say your agent did not sell this ticket to her at Joplin?' and he said, 'No, sir; he did not;' and I said, 'You are not a gentleman, to dispute a lady's word like that.'" She testified that his tone "was just very insulting," and that in this way he accused her sister of telling a falsehood. The evidence tended also to show that, under the rules of the company, it was the duty of the conductor to refuse to honor the ticket, and compel the passenger to either pay fare, or retire from the train at the next station, and that, if he had violated this rule and accepted the ticket, he would have had to pay for it out of his own pocket. Under the instructions of the court, the jury returned the issues in favor of the plaintiff, allowing her \$125 as damages. Nine of the jurors concurred in this verdict, and three were against it. Other facts may be noted in the course of the opinion.

1. Under the recent decisions of this court in banc, and of both divisions, had this appeal been taken to or transferred to this court after the decisions in *Russell v. Croy*, 164 Mo. 69, 63 S. W. 849, and *Gabbert, Adm'r, v. C., R. I. & Pac. Ry. Co.*, 171 Mo. 84, 70 S. W. 891, in which it was held that the amendments to article 10 of the Constitution by adding thereto two

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sections, to be known as sections 22 and 23, and to section 28 of article 2, were duly and legally adopted, so far as the publication of the notices of the election and the submission of the same to the qualified voters was concerned, this appeal should be remanded to the St. Louis Court of Appeals, as the sole ground upon which it is transferred to this court is that the amendment to section 28 of article 2, permitting nine jurors in a civil case to make a verdict, was never legally adopted; but inasmuch as the appeal, when taken, fairly raised the constitutional question whether such amendments had in fact become a part of the Constitution, and was taken prior to the settlement of that question by this court in the cases above cited, we will retain the appeal as properly in this court; otherwise we would not. *Lee v. Jones* (Mo. Sup.) 79 S. W. 927; *Carpenter v. Hamilton* (Mo. Sup.) 84 S. W. 863.

2. On both sides it is conceded that this action is one sounding in tort, to wit, the wrongful ejection of plaintiff from defendant's train on the night of April 6, 1900, by one of the defendant's conductors in charge thereof. The allegation as to the contract of transportation, to wit, the ticket described in the petition, is matter of inducement, to show that plaintiff was rightfully on the train, and hence that her expulsion was unlawful. *Book v. C., B. & Q. R. Co.*, 75 Mo. App. 604; *Ry. Co. v. Reynolds*, 55 Ohio St. 370, 45 N. E. 712, 60 Am. St. Rep. 706; *Ry. Co. v. Roberts*, 91 Ga. 513, 18 S. E. 315.

At the root of the case lies the question whether the ticket which plaintiff offered to the conductor entitled her to passage on the train, or by its terms had expired, and therefore the conductor was justified in demanding fare to Monett, and, upon plaintiff's refusal to pay fare, to require her to leave the train. The question is by no means a new one. It may, we think, be safely stated that the general rule is that when a passenger purchases a ticket for transportation from one point to another over the road of a common carrier, and pays full or regular ordinary fare, the ticket is not intended as a contract itself, but as a mere token or evidence of a contract which the law creates, and which lies behind the ticket. In such case the law makes the contract and regulates the reciprocal rights and duties of both carrier and passenger, and the ticket is a mere token that such contract exists, and under it the passenger is entitled to be carried to and from the points named, without regard to time limit printed upon it. *Railroad v. Turner*, 100 Tenn. 214, 47 S. W. 223, 43 L. R. A. 140; *Potter v. The Majestic*, 60 Fed. 624, 9 C. C. A. 161, 23 L. R. A. 746, note; *Watson v. L. & N. R. Co.* (Tenn.), 56 S. W. 1024, 49 L. R. A. 454.

On the other hand it has been held by a number of the highest courts in the United States, including the Supreme Court of the United States, that when, as in this case, the ticket on its face purports to be a special contract of carriage, and is based upon a valuable consideration (that is to say, sold at a reduced

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rate), then the ticket itself constitutes a contract of carriage between the parties, and the provision limiting the time within which it shall be good, and providing that it shall be stamped as of the date when the return passage is commenced, by the ticket agent at that place, and that the holder of the ticket must identify himself or herself to such agent as the original purchaser thereof, and sign the same in his presence, and the signing and attestation must be dated and indicated by punch marks on the ticket, and that such ticket should only be good for a continuous return passage commenced on that date, is a reasonable regulation, and binding upon the holder of such a ticket. Thus in *Mosher v. St. Louis, etc., R. Co.*, 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249, it appeared that the St. Louis, Iron Mountain & Southern Railway Company owned a railroad from St. Louis to Malvern, Ark., and the Hot Springs Railroad Company owned and operated a railroad from Malvern to Hot Springs, Ark., and the Iron Mountain Company sold a ticket at a reduced rate of fare for a passage from St. Louis to Hot Springs and return, and the ticket contained stipulations by which the purchaser agreed that in selling the ticket the St. Louis, Iron Mountain & Southern Railway Company acted only as agent, and was not responsible beyond its own line, and that the ticket was good for going passage only five days from the date of sale stamped on the back and written below, and would not be good for return passage unless the holder identified himself as the original purchaser to the satisfaction of the authorized agent of the Hot Springs Railroad at Hot Springs, Ark., within 85 days from date of sale, and, when officially signed and dated in ink and duly stamped by said agent, the ticket should then be good only five days from said date; and it was expressly agreed that the purchaser would, whenever called upon, identify himself to any conductor or agent of the lines over which the ticket read, and that no agent or employee of any of the lines named in the ticket had any power to alter, modify, or waive any of the conditions named on the ticket; and it appeared that the plaintiff went to Hot Springs, and, within the time limited by the ticket, desiring to return to St. Louis, presented himself and said ticket at the business and ticket office and depot of the Hot Springs Railroad, in the city of Hot Springs, during business hours, and a reasonable time before the departure of its train for St. Louis, for the purpose of identifying himself as the original purchaser of said ticket, and of having the same officially signed, dated, and stamped by said agent, but the Hot Springs Railroad Company failed to have said agent there at any time between the time when the plaintiff so presented himself and his ticket and the time of departure of the train, whereby, as it was alleged, the Iron Mountain Company and its agent and the agent of the Hot Springs Railroad at Hot Springs, without any just cause or excuse, failed to identify plaintiff as the original purchaser, or

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to officially sign, date, and stamp said ticket; and the plaintiff thereupon boarded the train of the Hot Springs Railroad, and was carried thereby to Malvern, where on the same day he boarded a regular passenger train of the Iron Mountain Company for St. Louis, and, upon the conductor demanding his fare, presented his ticket, and informed the conductor of the failure of the agent at Hot Springs to be at the office so that he could identify himself, and offered to sign his name and otherwise identify himself to the conductor, and demanded to be carried to St. Louis by virtue of his said ticket, but the conductor refused and put him off the train—it was held that the ticket was a valid contract, and binding upon the holder thereof, and, by its express terms, the plaintiff had no right to a return passage under the ticket unless it bore the stamp of the agent at Hot Springs, and that such a stamp was made by the contract a condition precedent to the right of a return passage, and no agent or employee of the defendant was authorized to waive that condition. It was held that, by the first condition of the contract, the defendant was not responsible beyond its own line, and was not responsible to plaintiff for failing to have an agent at Hot Springs; that, by the contract, the agent who was to identify plaintiff and stamp his ticket was the agent of the Hot Springs Railroad Company, and it was the duty of that company to identify plaintiff, and not the defendant; that the conductor of the defendant's train had no authority to dispense with the want of such stamp, or to inquire into the previous circumstances. The rule announced in that case was reasserted in *Boylan v. Hot Springs Railroad Co.*, 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290; and it was further held that the purchaser of a ticket from a railroad company, at a reduced rate of fare, for passage to a certain station and back, containing a contract, signed by him, that the ticket should not be good for return passage unless stamped by the agent of the company at that station, and that no agent of the company was authorized to alter or modify any condition of the contract, was bound by those conditions, whether he knew them or not, and neither the action of the baggage master in punching the ticket and checking the plaintiff's baggage, nor that of the gateman in admitting him to the train, could bind the defendant to carry him, or estop it to deny his right to be carried. To the same effect, see *Watson v. L. & N. R. Co.* (Tenn.) 56 S. W. 1024, 49 L. R. A. 454; *Edwards v. R. Co.*, 81 Mich. 364, 45 N. W. 827, 21 Am. St. Rep. 527; *Bowers v. Pennsylvania Co.* (Pa.) 27 Atl. 893; 4 Elliott on Railroads, § 1593, p. 2484; *Pennington v. P., W. & B. R. Co.*, 62 Md. 95; *West Md. R. Co. v. Stocksedale*, 83 Md. 245, 34 Atl. 880, and cases cited; *Moses v. R. R.*, 73 Ga. 356. In the last-cited case the circumstance noted by the plaintiff on this appeal, to wit, that the St. Louis, Nashville & Chattanooga Railroad Company accepted plaintiff's ticket on her return, and waived the limitations as to the time in the contract, was com-

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mented on by Chief Justice Jackson, who said: "The ticket passed him over two roads, but each had a right to stand on the contract. If one passed him, the other was not bound thereby to pass him also, in the teeth of the contract he had made." See, also, *Dangerfield v. Railway Company* (Kan. Sup.) 61 Pac. 405; *Comer v. Foley* (Ga.) 25 S. E. 671; *Abram v. Railway Company*, 83 Tex. 61, 18 S. W. 321; *Rahilly v. Railway Company*, 66 Minn. 153, 68 N. W. 853.

It is asserted, however, by the plaintiff in this case that this line of authority is not the law in this state, and we are cited to *McGinnis v. R. R.*, 21 Mo. App. 399, and to *Cherry v. Railway Company*, 52 Mo. App. 499, as sustaining this contention. It is evident, however, from the reading of those cases, that neither of them reached the point now under discussion. In the *Cherry Case* the passenger had purchased a first-class passenger ticket, which read, "Good to stop over at all points." It was held that this justified the passenger in stopping off at a station short of his destination, and subsequently, within the life of the ticket, taking another train to his destination, and though on his presentation to the conductor of his ticket, with notice of his intention to stop over, the conductor took up the going coupon, and gave no check or token in lieu thereof, the passenger's rights were not affected, and the same conductor, with a knowledge of all the facts, was not justified in ejecting him from the train on his subsequent resumption of his journey. With that case we are entirely satisfied. The passenger had complied with every condition on his part, and had violated no rule of the company, and the same conductor who had wrongfully taken up the going coupon without preserving to the passenger any evidence of his right to resume his journey after the stop-over, with a full knowledge of all the facts and a personal acquaintance with the passenger, wrongfully ejected him. In the *McGinnis Case* the passenger held a return ticket, but the date of it was blurred, and the conductor was of the opinion that there had been an alteration in the date, and for that reason refused to honor the return coupon; but the ground of recovery was that it turned out that the blurring of the ticket was caused by the defendant's own agent in dating it when he sold it, and the rude and offensive and insulting manner of the conductor in ejecting the plaintiff. That case likewise does not reach the point before us. In *Hot Springs Railroad Company v. Deloney*, 65 Ark. 177, 45 S. W. 351, 67 Am. St. Rep. 913, the authorities are collected with much industry, and the conclusion reached that the efforts of the court to reconcile the conflicting views as to the right of the conductor, in collecting tickets and fares, to rely entirely upon the face and appearance of a ticket presented to him, in determining his duty as to the acceptance of the same, had not met with any degree of success. In that case it was held that notwithstanding the conductor had only carried out the company's rules and regulations, and that they were

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reasonable, and he therefore was blameless personally, inasmuch as the company which was sued, through its ticket agent, acting for it, had been guilty of doing that which produced the injury to the plaintiff, it was liable for such neglect, and could not shield itself behind the faithfulness of its servant, the conductor. We think that decision was unquestionably correct, and was but the application of the common-law of principal and agent. In that case the company was rightfully held responsible for the natural and reasonable consequences of the neglect of its own agent. But that case does not reach the question before us—whether the defendant company in this case is responsible for the neglect of the plaintiff to read the contract on her ticket, and in not complying therewith, and the mistake or negligence of the agent of the connecting line at Chickamauga, Ga. It is plain that no such question was involved in the Deloney Case, *supra*.

We have laboriously gone through the long line of cases cited to us by respondent, and find that in most of them the action was directly against the company whose agent had been guilty of the neglect or negligence which produced the inconvenience and injury to the passenger, or they were cases in which the ticket was apparently regular on its face, and the passenger misled thereby, and various other circumstances in which it was held that the defendant company was liable for the wrongful and negligent acts of its own servants; and, in our opinion, without attempting a review of all those cases or reconciling them, we think they are clearly distinguishable from the facts upon which the case is bottomed, and, in our opinion, the correct doctrine is stated in *Mosher v. Railway*, 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249, and *Boylan v. Railroad*, 132 U. S. 146, 10 Sup. Ct. 50, 33 L. Ed. 290. We think the provisions of the ticket in this case were reasonable regulations, and that the agent at Chickamauga had no authority to bind the defendant company by waiving any of the contract provisions which inured to the benefit of all the roads which were parties to that contract, and the fact that the other roads waived the conditions in no manner affected the defendant's rights. By the terms of the contract, plaintiff was only entitled to a continuous return passage within the limits of the ticket, commencing on the date that she was identified and the ticket stamped and punched at Chickamauga for the return passage, and that consequently when it was presented to the conductor of defendant's road on the 6th of April, 1900, it had expired, according to the limitations plainly printed thereon, and did not entitle plaintiff to a passage from St. Louis to Monett, and that the conductor was justified in refusing to accept the ticket for passage between those points. And it is no justification of plaintiff's insistence that she had not read the contract which she had signed. The stipulations of the contract were plainly printed on the face of the ticket, in a way not calculated to escape observation, and

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the plaintiff's own evidence shows that she knew she was receiving a special rate, and went to Joplin for the express purpose of getting a ticket for a reduced fare; and, under the circumstances, it was her duty to read it when she received it, and, in the absence of proof of fraud, imposition or deceit, the law presumes she had knowledge of its contents, and must be held to have assented to the terms thereof. *Snider v. Adams Ex. Co.*, 63 Mo., loc. cit. 383; *Watson v. L. & N. R. Co.* (Tenn.) 56 S. W. 1024, 49 L. R. A. 454. Hence the instruction given for the plaintiff as to the right of the plaintiff to rely upon the statement made by the agent of the Chattanooga, Rome & Southern Railroad that she could be identified and have said ticket stamped on the 22d of March, 1900, and it would be good for her return passage at a later date, was erroneous.

But notwithstanding plaintiff had no right to passage over the defendant's road by virtue of said ticket after the same had expired by virtue of its limitations, and the failure of plaintiff to comply with the provisions of her contract with defendant, and while we think that when plaintiff was notified of the invalidity of the ticket and refused to pay the fare to Monett, the conductor had the right to remove her from the train, he had no right to use unnecessary and insulting language to her, and thereby hurt her feelings and humiliate her; and, if he did so, she was entitled to recover compensatory damages for such injured feelings and humiliation, but nothing in the way of punitive or exemplary damages. There is no pretense that the conductor offered the plaintiff any personal violence, or that any other servant of the company did. On the contrary, it appears that the Pullman conductor and his porter rendered her every assistance that was possible when she left the train. If plaintiff's evidence is to be accepted, her leaving the train in obedience to the command of the conductor to the porter to see that she got off at Pacific must be regarded as an ejection from the train, and she very properly avoided the humiliation of being forcibly removed from the train. If, however, plaintiff left the train of her own free will and accord, and against the advice of the conductor, and refused to remain on the train and permit the conductor to hold her baggage check as security for her passage, if the general officers of the company should agree with the conductor that her ticket had expired, or, if they should decide the ticket was good, then she need not pay any other fare, then there was no ejection from the train within the meaning of the law, and plaintiff has no cause of action whatever against the company. That plaintiff suffered no appreciable damages in the way of delay in reaching her home, or of any discomfort by changing from one train to another, is perfectly apparent.

From the statement of facts in this case it must be apparent that the liability of the defendant in this case hinges upon the consideration whether the agent at Chickamauga of the connecting lines was the agent of the defendant in this case, by

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reason of the contract of carriage over the several lines mentioned in the ticket, and what force is to be accorded to the clause stipulating that the defendant in this case acted simply as agent, and was not responsible beyond its own line. If the defendant is to be held as agent for all the other roads over which this ticket reads, then there is much reason and authority for holding it liable for the misleading representation of the agent at Chickamauga waiving the agreement that the ticket should be stamped and the passenger identified on the day of the commencement of the return passage. If, on the other hand, the ticket and contract therein, properly construed, is the separate contract of each of the companies over which it reads, and the defendant, in issuing the ticket, is to be held only as an agent of the others, and not responsible for their defaults, then we can discover no legal reason why the defendant should be held responsible for the misrepresentation of the agent of the connecting line at Chickamauga. Judge Elliott, in his work on Railroads, vol. 4, § 1596, says: "There is some conflict among the authorities upon the subject of through tickets over several different roads, but the rule which is supported both by the better reason and by the weight of authority is that, even when the ticket does not expressly provide that the first company is acting for the other companies merely as their agent in selling it, the rights of the passenger and the duties and responsibilities of the different companies are substantially the same as if the ticket had been purchased at the office of each company separately, unless there is something in the contract making the first company responsible beyond its own line." And this statement of the law is supported by the decision of the Supreme Court of the United States in *Mosher v. Railroad Company*, 127 U. S. 390, 8 Sup. Ct. 1324, 32 L. Ed. 249, already noted; and Mr. Hutchinson, in his work on Carriers, § 152, indorses this statement of the rule; and to the same effect is *Railway Co. v. Looney*, 85 Tex. 158, 19 S. W. 1039, 16 L. R. A. 471, 34 Am. St. Rep. 787; *Harris v. Howe*, 74 Tex. 534, 12 S. W. 224, 5 L. R. A. 777, 15 Am. St. Rep. 862; *Central Trust Co. v. East Tenn., etc., Co.* (C. C.) 65 Fed. 332. The only case directly in point opposing this statement of law is that of *Head v. Railway Company*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434. In that case, it is true, the learned and distinguished jurist Chief Justice Bleckley, upon a similar ticket, held that the agent at New Orleans, the point of destination, was the representative of the selling company, but he enters into no discussion whatever of the principle upon which he bases this conclusion: and, profound as is our respect and admiration for that gifted jurist, we think his conclusion is opposed by the great weight of authority and the elementary principles of the law of principal and agency. Moreover, we think that the Supreme Court of Georgia could have reached the conclusion which it did by applying the doctrine of numerous cases on this subject, and

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holding that it was clearly the mistake of the selling agent at Tallapoosa, in placing the stamp on the wrong margin, and in having the passenger sign at the wrong place, and the action in that case was properly against the selling company for its own default and the damages resulting therefrom.

Our conclusion is that the agent at Chickamauga was not the agent of the defendant in this case, and that the defendant cannot be held responsible for his neglect or misconstruction of the contract; and that the conductor of the defendant was bound, under the rules and regulations of the defendant, to decline to recognize said ticket after it had expired according to the contract embodied in it. And as already said, we can see no possible ground upon which plaintiff can recover of this defendant, save and except that the conductor, in the performance of a perfectly legal right, performed it in a rude or insulting manner, as to which the evidence is in strong conflict, and in such case is a question of fact for the jury.

As the judgment of the circuit court must be reversed for the reasons above given, it becomes unnecessary to decide whether the verdict, in the form in which it was rendered, would constitute reversible error, as that objection can be readily obviated on another trial by the court requiring the jurors to sign the verdict as required by the act of 1901, p. 190.

The judgment is reversed, and the cause remanded, to be proceeded with in accordance with the views herein expressed. All concur.

SWEET v. BIRMINGHAM RY. & ELECTRIC CO.

(Supreme Court of Alabama, Dec. 21, 1905.)

[39 So. Rep. 767.]

Carriers—Injuries to Passengers—Contributory Negligence.*—The slowing up of a train for a station is not an invitation to the passenger to alight while the train is in operation or moving, or for the passenger to place himself in a position of peril.

Trial—Instructions—General Affirmative Charge.—In an action for injuries to a passenger, where the evidence entirely failed to show any wantonness on the part of the trainmen, the general affirmative charge with hypothesis for defendant was properly given as to counts of the complaint alleging wantonness on the part of defendant, its agents, or servants, in inflicting the injury.

Carriers—Injuries to Passengers—Actions—Instructions.—In an action for injuries to a passenger, a charge that, unless the jury believe from the evidence that defendant's servant or agent was guilty of negligence, they must find for defendant, was proper.

Same—Contributory Negligence.†—In an action for injuries to a

*For the authorities in this series on the question as to what constitutes an invitation to a passenger to alight from a car or train, see foot-notes appended to *Mearns v. Central R. R. of New Jersey* (C. C. A.), 17 R. R. R. 97, 40 Am. & Eng. R. Cas., N. S., 97.

†See foot-notes appended to *Moulton v. Sanford & C. P. Ry. Co* (Me.), 18 R. R. R. 154, 41 Am. & Eng. R. Cas., N. S., 154.

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passenger, a charge that, if plaintiff was guilty of negligence which contributed approximately in the slightest degree to her injury, the jury must find for defendant, was proper.

Same—Alighting from Moving Train.—A passenger is guilty of contributory negligence in attempting to get off a moving car at a time when a reasonably prudent person similarly situated would not attempt to alight.

Same—Instructions.—In an action for injuries to a passenger, instructions stating in effect that defendant was guilty of negligence if it slowed up its train to receive a passenger, and after so slowing up moved off more rapidly without seeing that plaintiff, who was wishing to get off, was not in a position of peril, were bad, in that they took from the jury the question of defendant's negligence.

Same.—In an action for injuries to a passenger, a charge that plaintiff was entitled to recover if defendant negligently moved the train more rapidly after slowing down at the station at which plaintiff wished to alight, provided plaintiff acted on the slower motion of the train and attempted to get off, and such slower motion was such as to make plaintiff believe that it was safe to act upon it, and the injury was occasioned by the increased speed, was bad, in that it hypothesized defendant's negligence on plaintiff's belief under the circumstances, and not on the belief of a reasonably prudent person.

Appeal from Circuit Court, Jefferson County; A. A. Coleman, Judge.

"Not officially reported."

Action by M. M. Sweet against the Birmingham Railway & Electric Company. From a judgment for defendant, plaintiff appeals. Affirmed.

This is an action for personal injury, brought by appellant against appellee for failure to stop dummy a reasonable time to allow appellant to alight therefrom, and in violation of this duty carelessly and negligently caused said train to move suddenly, throwing plaintiff to the ground and injuring him. This was the gravamen of the complaint, which contained several counts, some in simple and some in wanton negligence.

The following charges were asked by the defendant and given:

Charge 6 was the affirmative charge for the defendant under the fifth count of the complaint, with hypothesis.

Charge 7 was the affirmative charge, with hypothesis, for defendant under the sixth count.

Charge 8 was the affirmative charge, with hypothesis, for the defendant under the seventh count.

Charge 9 was the same under the eighth count.

Charge 10 was the same charge under the ninth count.

"(11) Unless you believe, from all the evidence, that the

‡See foot-note appended to *Walker v. Georgia Ry. & Elec. Co.* (Ga.), 16 R. R. R. 654, 39 Am. & Eng. R. Cas., N. S., 654; foot-note appended to *Birmingham Ry., L. & P. Co. v. Willis* (Ala.), 16 R. R. R. 523, 39 Am. & Eng. R. Cas., N. S., 523; foot-notes appended to *St. Louis S. W. Ry. Co. of Texas v. Highnote* (Tex.), 16 R. R. R. 41, 39 Am. & Eng. R. Cas., N. S., 41; foot-note appended to *Georgia, C. & N. Ry. Co. v. Hutchins* (Ga.), 15 R. R. R. 727, 38 Am. & Eng. R. Cas., N. S., 727.

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defendant's servant or agent was guilty of negligence, you must find for the defendant.

"(12) If, from all the evidence, you believe that the plaintiff was guilty of negligence which contributed proximately in the slightest degree to her injury, you must render your verdict in favor of the defendant.

"(13) If you believe, from all the evidence, that the plaintiff attempted to get off of the car while it was in motion, and that at the time she did attempt to get off a reasonably prudent person situated as she was would not have attempted to get off, I charge you that the plaintiff was guilty of contributory negligence."

The plaintiff requested the following charges in writing, which were refused:

"(1) The court instructs the jury that if they believe, from the evidence, that the defendant company slowed up its train for the purpose of receiving a passenger at Eighth avenue, in Bessemer, it was incumbent on the defendant to see and know that the plaintiff in this case as a passenger was not in a position of peril; and if they believe that the said defendant, after so slowing up, moved off more rapidly without seeing that the plaintiff was not in a position of peril as a passenger wishing to get off, then the defendant, if they moved up more rapidly without so knowing that the plaintiff was not in a position of peril, was guilty of negligence.

"(2) The court instructs the jury that if they believe, from the evidence, that the defendant company slowed up its train for the purpose of receiving a passenger on the train at Eighth avenue, in Bessemer, and moved up at a faster rate of speed without seeing that the plaintiff in this case, as a passenger on said train, was not in a position of peril, and that plaintiff fell off or was thrown off on account of such failure, then they will find for the plaintiff.

"(3) The court instructs the jury that if a train is slowed up at a station when a passenger wishes to get off (whether the conductor knows it or not), whether it is slowed up to receive a passenger or to let one off, a passenger wishing to get off has a right to avail himself or herself of such slowing up as an invitation to get off; and if such passenger is thrown off and injured while attempting to get off under such circumstances, by reason of being thrown off by a sudden jerk in the movement of the train, or by the sudden increased movement of said train, and injured thereby while the train is at or near the station or stopping place, such passenger is entitled to recover damages for such injury.

"(4) The court instructs the jury that whether they believe, from the evidence, that the train came to a stop or not, yet, if they believe that the plaintiff received her injuries by reason of defendant negligently moving up the train more rapidly after slowing down at the station, where she wished to depart, this

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was negligence which would entitle the plaintiff to recover, if they further believe that the plaintiff as a passenger had acted on such slowing up and attempted to get off, provided they believe that such slowing up was such as to make plaintiff believe that it was safe to act on it and the injury was occasioned by increasing the speed after so slowing up.

"(5) I charge you, gentlemen of the jury, that if a railroad company, in operating its dummy line and trains, as they are commonly known and called, in approaching a station or stopping place, begins to slow up its train for the station for the purpose of taking on or letting off a passenger, this is an invitation to the passengers on the train that they may alight; and if a passenger acts on the invitation, and as the train approaches a station the passenger goes out on to the platform preparatory to alighting, the passenger is not necessarily negligent in so doing; and if the company fails to bring the train to a standstill, but continues the train at a move slowly, or not exceeding two miles an hour, and the passenger alights, and if, while the passenger is alighting, the defendant increases the speed of the train, and the passenger is by reason thereof caused and made to fall and is injured, the passenger is entitled to recover, unless there is obvious danger in doing so."

J. A. Estes and James Trotter, for appellant.
Walker, Porter & Walker, for appellee.

HARALSON, J. The court charged, "that the slowing up of a train for a station may be notice to a passenger or passengers that the train is approaching a station; but it is not an invitation to a passenger to alight while the train is in operation or moving, or to place themselves in a position or place of peril." In this we have been unable to discover any error.

Charges 6, 7, 8, 9 and 10, given for defendant, were free from error. The counts to which they were directed, were for wantonness on the part of defendant, its agents or servants in inflicting the injury on plaintiff. There was no conflict in the evidence as to the conduct of those in charge of the train, and it was entirely lacking in any of its tendencies to show wantonness on their part.

The eleventh charge for defendant was free from error.

The twelfth charge for defendant was proper. 5 Mayfield's Dig. 717, § 94. Charge 13 was also free from error. *R. & D. R. R. Co. v. Farmer*, 97 Ala. 145, 12 South. 86.

Charges 1, 2 and 3, requested by plaintiff, were properly refused. They are subject to the vice of taking from the jury the question of defendant's negligence in inflicting the injury on the plaintiff. Whether or not defendant was guilty of negligence, was a question for the jury under all the facts of the case. *Street v. B. R. & E. Co.*, 136 Ala. 166-169, 33 South. 886.

Charge 4, if not otherwise bad, hypothesizes defendant's negligence and liability upon the belief of the plaintiff that it was

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safer for her to attempt to get off the train under the circumstances. The question properly was, what would a reasonably prudent, sensible person have believed, and how would he have acted under like circumstances?

Charge 5 is bad in that it asserts as a matter of law, if a train slows up in approaching a station, that this is an invitation for a passenger to alight, even if in doing so, he puts himself in a position of peril.

We find no reversible error in the record and the judgment of the circuit court must be affirmed.

Affirmed.

TYSON, SIMPSON, and ANDERSON, JJ., concur.

UNITED RAILWAYS & ELECTRIC CO. OF BALTIMORE v. WEIR.

(Court of Appeals of Maryland, Dec. 6, 1905.)

[62 Atl. Rep. 588.]

Carriers—Duty Towards Passengers.*—While carriers of passengers are not insurers of absolute safety, yet they are bound to exercise the highest degree of care which is consistent with the nature of their undertaking.

Same—Discharge of Passengers—Duration of Stop.†—Where a railroad stops its cars to allow a passenger to alight, it is bound to stop a sufficient length of time to enable him to alight in safety, and is liable for an injury to a passenger occasioned by reason of its failure so to do.

Same—Action—Evidence—Sufficiency.—In an action against a street railroad for injuries to a passenger, evidence held sufficient to show negligence on the part of the railroad in suddenly starting the car while plaintiff was alighting.

Trial—Directed Verdicts.—The court, in passing upon defendant's prayers for a directed verdict, must assume the truth of plaintiff's testimony.

Negligence—Question of Fact or Law.—The question of negligence is ordinarily one of fact and not of law, but the court may hold plaintiff guilty of contributory negligence when some prominent and

*For the authorities in this series on the question of the degree of care required of a carrier of passengers, see foot-note appended to *Denham v. Washington Water Power Co.* (Wash.), 17 R. R. R. 689, 40 Am. & Eng. R. Cas., N. S., 689; foot-notes appended to *Atchison, etc., Ry. Co. v. Holloway* (Kan.), 17 R. R. R. 648, 40 Am. & Eng. R. Cas., N. S., 648; *Blake v. Camden Interstate Ry. Co.* (W. Va.), 17 R. R. R. 619, 40 Am. & Eng. R. Cas., N. S., 619; *Little Rock Traction & Electric Co. v. Kimbro* (Ark.), 17 R. R. R. 501, 40 Am. & Eng. R. Cas., N. S., 501; *Western Maryland R. Co. v. Shivers* (Md.), 17 R. R. R. 34, 40 Am. & Eng. R. Cas., N. S., 34; foot-notes appended to *Abbott v. Oregon R. Co.* (Ore.), 16 R. R. R. 52, 39 Am. & Eng. R. Cas., N. S., 52; *South Covington & C. St. Ry. Co. v. Smith* (Ky.), 16 R. R. R. 26, 39 Am. & Eng. R. Cas., N. S., 26.

†For the authorities in this series on the subject of the care required in discharging passengers, see foot-notes appended to *Little Rock Traction & Elec. Co. v. Kimbro* (Ark.), 17 R. R. R. 501, 40 Am. & Eng. R. Cas., N. S., 501; foot-notes appended to *Willworth*

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decisive act of negligence has been committed by him, in regard to the character and effect of which no room is left for ordinary minds to differ.

Carriers—Injuries to Passengers—Contributory Negligence—Question for Jury.†—A passenger was not guilty of contributory negligence per se in attempting to alight from a street car while it was moving very slowly and smoothly, but whether her act in so doing was negligent was a question for the jury under all the facts in the case.

Appeal from Court of Common Pleas, George M. Sharp, Judge.

Action by Sarah A. Weir against the United Railways & Electric Company of Baltimore. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before MCSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, JONES, SCHMUCKER, and BURKE, JJ.

Albert E. Donaldson, for appellant.

Howard Bryant, for appellee.

BURKE, J. The appellee sued the appellant company for personal injuries sustained by her when alighting from one of its cars. The narr. avers that on the 7th day of August, 1903, while the plaintiff was a passenger on one of the cars of the defendant company at or near the corner of Baltimore and Paca streets, in the city of Baltimore, and after the car had come to a full stop, the plaintiff desired to alight from said car, and proceeded to do so; but before the plaintiff could get off of the car, and while she was exercising due care and caution, the said car was negligently and prematurely started by the agents and servants of the defendant while the said plaintiff was in the act of alighting from the car, and that by such negligence and premature starting of the car the plaintiff was thrown to the ground, and thereby sustained serious and permanent injuries. The accounts given by the witnesses as to the happening of the accident are conflicting, but it is sufficient to say that, so far as the plaintiff's case is concerned, she offered evidence tending to show the following facts: That on the morning of the accident, about the hour of 11 o'clock, she was a passenger on one of the cars of the defendant company coming east on Baltimore street; that when the car reached the corner of Baltimore and Paca streets it stopped, and that she attempted to alight therefrom;

† Boston Elevated Ry. (Mass.), 16 R. R. R. 69, 39 Am. & Eng. R. Cas., N. S., 69.

† For the authorities in this series on the question whether it is contributory negligence to alight from a moving car, see foot-notes appended to *Mearns v. Central R. R. (C. C. A.)*, 17 R. R. R. 97, 40 Am. & Eng. R. Cas., N. S., 97; *Kansas City, etc., R. Co. v. Matthews (Mo.)*, 17 R. R. R. 79, 40 Am. & Eng. R. Cas., N. S., 79; *Walker v. Georgia Ry. & Elec. Co. (Ga.)*, 16 R. R. R. 654, 39 Am. & Eng. R. Cas., N. S., 654; *Hart v. State (Md.)*, 16 R. R. R. 622, 39 Am. & Eng. R. Cas., N. S., 622.

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that she arose from her seat, and caught hold of the handle bar, and stepped down on the footboard of the car, and was in the act of getting down from the footboard to the street, and whilst in this position the conductor rang the bell, and the car started; that the sudden starting of the car broke her hold on the handle bar, and threw her into the street; and that in consequence of being thus thrown she sustained serious injuries. The defendant offered evidence tending to prove that the car stopped at the corner of Baltimore and Paca streets, and that the plaintiff made no effort to leave the car until after it had started; that the car was in motion when she got upon the footboard, and that she was thrown when in the act of stepping to the ground from the footboard of the moving car; that the car stopped at the corner of Baltimore and Paca streets, and had just started when the accident occurred, and had hardly time to move off at any speed when the injury occurred; that it had gone a very short distance after it had started, one witness fixing the distance at 10 feet, and another at 3 or 4 feet, and all of the defendant's witnesses concurring in the statement that at the time the plaintiff stepped from the footboard and was injured the car was running smoothly and very slowly. At the conclusion of the case the appellee offered three prayers which were granted by the court, and the defendant offered five, the fourth was granted, the fifth was granted as modified by the court, and its first, second, and third prayers were refused. To the action of the court granting the plaintiff's prayers and in refusing its first, second, and third prayers, and in amending its fifth prayer the defendant excepted, and the verdict and judgment being against the defendant, it was appealed.

The bill of exceptions brings up for review only the rulings of the court on the prayers. In the argument before this court no question was made by the counsel for the appellant as to the correctness of the ruling of the court on the plaintiff's prayers. We find no error in the granting of these prayers. They announced the correct principles for the guidance of the jury in fixing the defendant's responsibility for the injury complained of, and also the correct rule for estimating the damages in case the jury should find for the plaintiff. The defendant's first and second prayers were properly refused. The first prayer asked the court to direct a verdict for the defendant, because there was no evidence in the case legally sufficient to entitle the plaintiff to recover, and the second prayer asked the court to say that the undisputed evidence in the case showed that the negligence of the plaintiff contributed to the injury of which she complained, and therefore the verdict must be for the defendant. In view of the evidence offered by the plaintiff it is clear that the court could not grant either of these prayers.

It is settled that while the carriers of passengers are not insurers of absolute safety, yet they are bound to exercise reasonable care according to the nature of their contract; and as their

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employment involves the safety of the lives and limbs of passengers, the law requires the highest degree of care which is consistent with the nature of their undertaking. *Baltimore & Ohio R. R. v. State, Use of Hauer*, 60 Md. 449. A railroad company undertaking the carriage of passengers for hire, which stops its cars for the purpose of allowing a passenger to alight therefrom is under an obligation to stop a sufficient length of time to enable him to alight in safety, and if a passenger is injured by reason of the failure of the company to observe this obligation it is liable for the injury. *Cumberland Valley R. R. Co. v. Maugans*, 61 Md. 53, 48 Am. Rep. 88; *United Railways Company v. Hertel*, 97 Md. 382, 55 Atl. 428. Assuming the testimony of the plaintiff as to the happening of the accident to be true, and the court in passing upon these prayers was bound to assume its truth, there appears to have been, under the principles stated, a clear act of culpable negligence on the part of the defendant company.

The action of the court in rejecting the defendant's third prayer constitutes the main ground upon which it relies for the reversal of the judgment. This prayer asked the court to instruct the jury that if they found that the plaintiff "attempted to alight from the car while it was in motion, and before it came to a full stop," their verdict should be for the defendant. Under the authority of repeated decisions of this court it would have been manifest error for the trial court, under the facts as testified to by the defendant's witnesses, to have declared the plaintiff guilty, as matter of law, of negligence and want of ordinary care under the facts stated in the prayer. The question of negligence is ordinarily one of fact, and not of law. This is the general rule, but cases frequently occur in which the court will say that the plaintiff is guilty of contributory negligence when some prominent and decisive act of negligence is found to have been committed by him in regard to the character and effect of which no room is left for ordinary minds to differ. Whether it be negligence per se for one to attempt to alight from a moving car must depend always upon the circumstances of the particular case. In the case of the *Cumberland Valley Railroad Company v. Maugans*, supra, where a passenger on the appellant's cars was injured in alighting therefrom while the car was in motion, this court said that the weight of authority is against the proposition that it is always, as matter of law, negligence and want of ordinary care for a person to attempt to get off from a car while it is in motion; that in every case where the facts and circumstances are such that reasonable men may honestly entertain different views as to the nature and character of the act of the plaintiff, it is error in the court to pronounce the act negligence in law, but that the question should be left to the consideration of the jury. To the same effect are the cases of *B. & O. R. R. v. Kane*, 69 Md. 27, 13 Atl. 387, 9 Am. St. Rep. 387; *New York, Phila. & Norfolk R. R. Co. v. Coulbourn*, 69 Md. 360, 16 Atl. 208, 1 L. R. A. 541, 9 Am. St. Rep. 430; *Western Md. R. R. Co. v. Herold*, 74 Md. 510, 22 Atl. 323, 14 L. R. A. 75.

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It will be noticed that the prayer excludes from the consideration of the jury the question of the physical condition and activity of the plaintiff, and also all the facts and circumstances of the case as testified to by the defendant's witnesses as to the speed of the car, except the two facts that she attempted to alight from the car while it was in motion and before it came to a full stop; and if the jury should find these two segregated facts then the court was asked to say, as matter of law, there was such negligence on the part of the plaintiff as would preclude her right to recover, without regard to the other facts of the case. We are of opinion that the question of contributory negligence on the part of the plaintiff was properly left to the jury to determine under the instructions granted by the court upon all the facts and circumstances of the case, and that under the authority of the cases cited the prayer was properly refused. Finding no error in the ruling of the court, we affirm the judgment.

Judgment affirmed, the appellant to pay the costs.

RAYMOND v. PORTLAND R. CO.

(Supreme Judicial Court of Maine, Dec. 6, 1905.)

[62 Atl. Rep. 602.]

Carriers—Injuries to Passenger—Care Required—Instructions.—The plaintiff was a passenger on one of the street railway cars of the defendant. There was evidence tending to show that the car, an open one, had come to a stop near the point of intersection with the tracks of a steam railroad, that it was the practice and custom of the defendant to stop there, but that the only purpose of the stop was to safeguard the crossing of said tracks; it not being a place where a stop was regularly made for passengers to get off or on the defendant's cars, although it was also in evidence that passengers did sometimes get off or on the cars while so stopping. There was likewise evidence tending to show that, while the car was stopping at said point of intersection, the plaintiff undertook to alight therefrom, but that while she was in the act of alighting, and before she had reasonable time to alight, the car was started, whereby she was thrown and injured.

At the trial of this action the presiding justice, at the request of the plaintiff's counsel, gave the following instruction to the jury: "If you believe that this was the crossing of tracks, and that under the practice and custom of the company the cars stop at this crossing, and believe that people get on or off at this place while cars are stopped, then it was the duty of the conductor in charge of the car to ascertain for himself whether passengers wanted to get on or off; and if he could by great care discover who wanted to get off, whether they wanted to get off, that would be equivalent to actual knowledge on the subject."

Same—"Great Care."*—This instruction imposed upon the conductor the duty of exercising "great care" to discover if any one wanted to get off the car. It is not modified by any other clause

*For the authorities in this series on the question of the degree of care required of a carrier of passengers, see foot-notes appended to preceding case.

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in the charge, but rather emphasized by a statement made immediately before it that "the railroad was bound to use greater than ordinary care."

The law requires that the conductor should have acted only in the exercise of reasonable care. The phrase "great care," as used in the instruction, was without limitation. It was left entirely to the jury to say what meaning should be attached to it. Under it the jury may have said that it was the duty of the conductor to inquire of every passenger upon his car if they wished to alight, and that if he failed to do this, in the exercise of the duty requiring "great care," he was negligent; or, if so strenuous a duty as to inquire of each passenger was not deemed necessary in the exercise of "great care," the jury might have found that some other burdensome duty was imposed by the instruction given.

Negligence—Care Required—Definitions.†—The rule of law now generally recognized by the great weight of authority is that the legal measure of duty, except that made absolute by law, with respect to almost all legal relations, is better expressed by the phrases "due care," "reasonable care," or "ordinary care," terms used interchangeably. "Reasonable care" may be defined as such care as an ordinarily reasonable and prudent person exercises with respect to his own affairs, under like circumstances. In this definition it is the phrase "under like circumstances" that imposes upon the term "reasonable care" both its limitations and its elasticity. The term is a relative one. The same act under one set of circumstances might be considered due care, and under different conditions a want of due care, or negligence. Therefore the duty intended by the use of the phrase "ordinary care" is always referable to the circumstances and conditions, under which the act or omission to act is required to be performed. These limit or define the scope of the situation within which the performance of the same act may be called reasonable or unreasonable. Held, that the exceptions to the requested instruction given as aforesaid must be sustained.

(Official.)

Exceptions from Supreme Judicial Court, Cumberland County.

Action on the case by Ada I. Raymond against Portland Railroad Company for negligence, to recover for personal injuries to the plaintiff while a passenger on one of the cars of the defendant, a street railway corporation. Verdict for plaintiff for \$969. Defendant excepted to a certain instruction given by the presiding justice at the request of the plaintiff's counsel, and also filed a general motion for a new trial. Exceptions sustained. Motion not considered.

Argued before EMERY, STROUT, SAVAGE, and SPEAR, JJ.

Charles E. Gurney, for plaintiff.

Libby, Robinson, Turner & Ives, for defendant.

SPEAR, J. This is an action on the case for negligence to recover for personal injuries to the plaintiff while a passenger on one of the cars of the defendant, a street railway corporation. The case comes up on motion and exceptions. It was alleged in

†On the questions what constitutes negligence, and whether there are degrees of negligence, see extensive note, 17 R. R. R. 236, 40 Am. & Eng. R. Cas. N. S., 236.

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the plaintiff's declaration, and evidence was introduced by the plaintiff tending to show that the defendant's car had been brought to a full stop near the tracks of a steam railroad, and that the car was started again while the plaintiff was in the act of alighting therefrom, and before she had had sufficient and reasonable time to alight, whereby she was thrown and injured.

The defendants offered evidence tending to show that the car, an open one, had come to a stop near the point of intersection with the tracks of the steam railroad; that it was the practice and custom of the defendants to stop there, but the only purpose of the stop was to safeguard the crossing of the said tracks, it not being a station or place where a stop was regularly made for passengers to get off the defendant's cars, although it was in evidence that passengers did sometimes get off or on the defendant's cars there; that throughout the stop the conductor of the car remained upon the car, and was standing all the time on the running board on plaintiff's side of the car, but a few feet behind her, and with his attention upon his passengers of whom he had an unobstructed view; that another employee of the defendant's left the car and went forward to see if the crossing could be made in safety, and, upon finding the way clear, gave the signal for the car to proceed; that the plaintiff never made any movement to leave her seat until the car was again in motion after having made its stop to safeguard the crossing of the tracks, when, without giving any indication by signal or otherwise to the conductor or anybody else that she desired or intended to alight, she suddenly slid down from her seat to the running board, and thence off the car while it was in motion and gathering headway to cross the tracks of the steam railroad. The report of the evidence shows that the contention of the respective parties as above set forth is correctly stated.

Upon these contentions, at the request of the plaintiff's counsel, the presiding justice gave the following instruction to the jury: "If you believe that this was the crossing of tracks, and that under the practice and custom of the company the cars stop at this crossing, and believe people get on or off at this place while cars are stopped, then it was the duty of the conductor in charge of the car to ascertain for himself whether passengers wanted to get on or off; and, if he could by great care discover who wanted to get off, whether they wanted to get off, that would be equivalent to actual knowledge on the subject." To this instruction the defendants seasonably excepted. The defendants also requested certain instructions, but, in view of the conclusion necessarily arrived at with respect to the above instruction, it becomes unnecessary to consider this request by the defendants. We think the exception must be sustained. The instruction imposed upon the conductor the duty of exercising "great care" to discover if any one wanted to get off the car. This instruction is not modified by any other clause in the charge, but rather emphasized by the statement made immediately before

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it that "the railroad was bound to use greater than ordinary care."

We think the law required that the conductor should have acted only in the exercise of reasonable care. The phrase "great care," as used in the instruction, was without limitation. It was left entirely to the jury to say what meaning should be attached to it. They may have said that it was the duty of the conductor to inquire of every passenger upon his car if they wished to alight, and that, if he failed to do this in the exercise of the duty requiring "great care," he was negligent. Or, if so strenuous a duty as to inquire of each passenger was not deemed necessary in the exercise of "great care," the jury might have found that some other burdensome duty was imposed by the instruction given.

The rule of law now generally recognized by the great weight of authority is that the legal measure of duty, except that made absolute by law, with respect to nearly all legal relations, is better expressed by the phrases "due care," "reasonable care," or "ordinary care," terms used interchangeably. "Reasonable care" may be defined as such care as an ordinarily reasonable and prudent person exercises with respect to his own affairs, under like circumstances. In this definition it is the phrase "under like circumstances" that imposes upon the term "reasonable care" both its limitations and its elasticity. The term is a relative one; that is, the same act under one set of circumstances might be considered due care, and under different conditions a want of due care or negligence. Therefore the duty intended by the use of the phrase "ordinary care" is always referable to the circumstances and conditions under which the act or omission to act is required to be performed. These limit or define the scope of the situation within which the performance of the same act may be called reasonable or unreasonable. The same rule is now generally held to apply to employment in the most perilous places and in the manipulation and use of the most dangerous agencies. A person may be engaged upon a most treacherous machine, yet the employer is held only to the exercise of reasonable care in explaining the hazard connected with the machine and the operation of it. One may employ the use of dynamite or any other powerful explosive, and yet he is responsible only for due care. But in each of these cases due care, under the flexibility of the definition given, might, in the minds of the jury or of the court, require the exercise of the highest possible care which human effort could bestow; but yet it would be in the end only such care as an ordinarily prudent and careful man would exercise, under like circumstances, with respect to his own affairs.

Am. & Eng. Enc. Law (2d Ed.) vol. 21, p. 459, under the heading "Degrees of Negligence," summarizes the authorities as follows: "The theory that there are three degrees of negligence, described as 'slight,' 'ordinary,' and 'gross,' was introduced into the common law from some of the commentators of Roman law. While not in frequent use, references are still found in

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judicial discussions of the subject to the classification of negligence into degrees, the tendency of modern authority and the weight of the best considered cases are now opposed to this view, holding that in every case negligence, however described, is merely a failure to bestow the care and skill which the situation demands, and hence it is more accurate to call it simply negligence. Some decisions even go further and declare that the classification of negligence into degrees is a matter of pure speculation and of no practical consequence; that it is useless and tends to confusion; that in fact it is unsafe to base any legal decision on distinctions in the degrees of negligence."

In *Steamboat New World v. King*, 16 How. 469, 14 L. Ed. 1019, Mr. Justice Curtis, in delivering the opinion of the court, said: "The theory that there are three degrees of negligence, prescribed by the terms 'slight,' 'ordinary,' and 'gross,' has been introduced into the common law from some of the commentators of the Roman law. It may be doubted if these terms can be usefully applied in practice. Their meaning is not fixed or capable of being so. One degree, thus described, not only may be confounded with another, but it is quite impracticable exactly to distinguish them. Their signification necessarily varies according to circumstances, to whose influence the courts have been forced to yield until there are so many general exceptions that the rules themselves can scarcely be said to have a real operation." Then he proceeds to quote from *Storer v. Gowen*, 18 Me. 177, as follows: "How much care will in a given case relieve a party from the imputation of gross negligence, or what omission will amount to the charge, is necessarily a question of fact, depending upon a great variety of circumstances which the law cannot exactly define."

In *Perkins v. New York Central Railroad Company*, 24 N. Y. 196, the court say: "I think with Lord Denman, who, in *Hinton v. Dibbin*, 2 Q. B. 661, said: 'It may well be doubted whether between gross negligence and negligence merely any intelligent distinction exists.'"

In *Railroad Company v. Lockwood*, 17 Wall. 382, 21 L. Ed. 627, Mr. Justice Bradley, delivering the opinion of the court, said: "We have already adverted to the tendency of judicial opinion adverse to the distinction between gross and ordinary negligence. * * * And this seems to be the tendency of modern authors."

In *Milwaukee Railroad Company v. Arms et al.*, reported in 91 U. S. p. 494, 23 L. Ed. 374, the court say: "This court has expressed its disapprobation of these attempts to fix the degree of negligence by legal definition. * * * Some of the highest English courts have come to the conclusion that there is no intelligent distinction between ordinary and gross negligence. * * * 'Gross negligence' is a relative term. It is doubtless to be understood as meaning a greater want of care than is implied by the term 'ordinary negligence'; but

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after all it means the absence of the care that was necessary under the circumstances." See, also, *Rouse v. Downs*, 5 Kan. App. 549, 47 Pac. 982; *McPheeters v. Hannibal, etc., R. Co.*, 45 Mo. 22; *Reed v. Western Union Tel. Co.*, 135 Mo. 661, 37 S. W. 904, 34 L. R. A. 492, 58 Am. St. Rep. 609; *Culbertson v. Holliday*, 50 Neb. 229, 69 N. W. 853.

It will be here observed that the courts in discussing the above propositions have used the term "negligence," instead of the word "care," to express the measure of duty. But confusion has arisen from regarding "negligence" as a positive, instead of a negative, word.

For this reason, it is usual to express the duty owed in positive terms by stating what constitutes "due care," rather than in negative terms by stating what constitutes "negligence," which is the unintentional failure to perform a duty implied by law. "Negligence" is the opposite of "due care." Where due care is found, there is no negligence. If there is a want of due care, then there is negligence. We are inclined to agree with the great weight of judicial opinion that the attempt to divide negligence, or its opposite due care, into degrees, will often lead to confusion and uncertainty. It seems to us, therefore, that the measure of duty, owed by persons in the discharge of their mutual relations, would be better expressed by the use of the term "negligence," if one prefers a negative definition, or due, reasonable, or ordinary care, always having reference to the circumstances and conditions with regard to which the terms are used. In view of the above conclusion, it becomes unnecessary to consider the motion.

Exceptions sustained.

PEGRAM v. SEABOARD AIR LINE RY.

(Supreme Court of North Carolina, Oct. 17, 1905.)

[51 S. E. Rep. 975.]

Evidence—Hearsay—Oral Declarations.—A declaration of a stranger, to the effect that a statement shown to have been made by a witness in his presence was true, is not competent to corroborate the witness, but is hearsay.

Trial—Instructions—Conflict.—In an action for death by wrongful act, instructions that, if plaintiff's intestate left a place of safety and entered a burning building and attempted to extinguish the fire at a time and in a manner in which an ordinarily prudent person would not have done so, he was guilty of contributory negligence, and that the only limitation of the rule that one may incur risk to save property is that he must not recklessly expose himself to danger, were conflicting, and must necessarily have confused the jury.

Negligence—Contributory Negligence—Danger Incurred to Save Property.*—Where an employer's building was set on fire by the

*For the authorities in this series (master and servant cases omitted) on the subject of contributory negligence and assumption of risks where persons expose themselves to known dangers, see foot-notes appended to *Holmes v. Chicago, etc., Ry. Co.* (Neb.), 18 R. R. R. 485; 41 Am. & Eng. R. Cas., N. S., 485.

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negligence of a third person, and an employee, who had escaped from the building and from all danger, voluntarily returned to the building to save his employer's property, and was killed, his administrator could not recover for his death from the third person, unless he showed that the employee acted with such care and caution as a reasonably prudent man would have exercised under the circumstances; and it was insufficient for him to show merely that the employee did not act recklessly.

Death—Action for—Burden of Proof.—In an action for death by wrongful act, the burden is on plaintiff, not only to show negligence on defendant's part, but also that the death of his intestate was proximately caused by such negligence.

Appeal from Superior Court, Wake County; Moore, Judge.

Action by B. W. Pegram, administrator of John M. Wilson, deceased, against the Seaboard Air Line Railway. From a judgment for plaintiff, defendant appeals. Reversed.

T. B. Womack and Murray Allen, for appellant.

Argo & Shaffer, for appellee.

BROWN, J. The plaintiff contends that defendant, by means of its engine, negligently set fire to a cotton compress and warehouse at Hamlet, N. C., from which it communicated to the interior of the compress building, and while endeavoring to extinguish the flames the plaintiff's intestate was burned to death, and that defendant is liable therefor. It is further contended that Wilson, the intestate, was an employee of Chas. E. Johnson & Co., lessees of the compress and warehouse at the time, and was endeavoring to save the property of his employer from destruction. There was evidence tending to prove that, when the alarm of fire was given, Wilson escaped from the building and went out on the platform, but voluntarily went back in the burning building, where he was caught and burned to death. Plaintiff contends he went back for the purpose of saving his employer's property, and that it was in the line of duty that he met his death. The court submitted these issues: "(1) Was the injury and death of the intestate caused by the negligence of the defendant as alleged in the complaint? (2) Did the intestate by his own negligence contribute to his death? (3) What damage is plaintiff entitled to recover?" The jury answered the first issue "Yes," the second issue "No," and assessed the damages.

1. The witness Gibson had testified that the fire originated in the bagging on the platform. For the purpose of corroborating Gibson, a witness (Breedon) was permitted to testify that Gibson had repeatedly told him the same thing. On one occasion he testified that one Taylor was present. The witness was asked what Taylor said when Gibson made the statement. The defendant objected, the evidence was admitted, and defendant excepted. Witness then testified that Taylor said: "That is right. I saw it when it first blazed up outside." This evidence was not admitted to contradict

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Taylor, but only to corroborate Gibson. The court so stated. Taylor had been a witness, and was asked nothing about it. The defendant excepted, and we are of opinion that the exception is well taken. Gibson cannot be corroborated by what the witness Breeden heard another witness (Taylor) say. Taylor had not been examined on this subject, and the evidence was not offered to contradict Taylor. His unsworn declaration, therefore, delivered by the mouth of another, is not competent for the purpose of corroborating Gibson. It is hearsay. *Merrill v. Whitmire*, 110 N. C. 367, 15 S. E. 3. It is simply the unsworn declaration of Taylor as to a past event, and was incompetent. *Egerton v. Railroad*, 115 N. C. 645, 20 S. E. 184.

2. His honor gave the following instructions, among others, to the jury: "(16) That if the jury shall find from the evidence that Wilson, being in a place of safety, left it and entered the burning building and attempted to extinguish the fire, at the time and in the manner in which an ordinarily prudent person would not have done so, they will answer the second issue 'Yes.' * * * (22) The only limitation of the rule that an employee or servant or other person may incur risk to save property is that one must not recklessly expose himself to danger. Where he does not recklessly expose himself, because of the duty he owes his employer to attempt to save his property, his act is relieved of the character of legal cause, and the liability is remitted to the negligence of the defendant." These two instructions are conflicting, and must necessarily have confused the jury. As it is impossible to tell upon which one the jury acted, the defendant has just reason to complain. It is very generally held by the courts of this country that, where one is exposed to peril by the negligence of another, the latter is liable in damages for injuries received by a third person in a reasonable effort to rescue the person imperiled. Considerable divergence, however, exists between the courts as to how far this rule will be extended in an effort to save property endangered by the negligence of another. This question has provoked much judicial discussion. Some jurisdictions deny the right to recover at all, while others have extended the rule so as to give the party injured redress where his effort to save property has been such as a reasonably prudent man would have made under similar circumstances. No one, however, should be permitted to recover for injury sustained in attempting to recover mere property in the face of obvious danger such as no reasonably prudent man would under the circumstances incur. *Shearman & Redfield*, vol. 1, pars. 85, 87; *Berg v. Great Northern*, 70 Minn. 272, 73 N. W. 648, 68 Am. St. Rep. 524; *Liming v. Ill. Central*, 81 Iowa, 246, 47 N. W. 66; *Railway Co. v. Roberts*, 44 Ill. App. 179. Mr. Watson, in his work on Damages for Personal Injuries, discusses this subject very fully and clearly, and sums up his views in

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the following language: "The doctrine that a party may recover for personal injuries sustained in a prudent and reasonable endeavor to save or protect his own on another's property, threatened with injury by the defendant's negligence, has the support of several well-considered cases, and, properly limited, commends itself to the writer's view." We are willing to hold with many able jurisdictions that, when the employer's property is set on fire by the negligence of another, the employee may attempt to rescue it, but not in the presence of obvious danger. If the employee exposes himself rashly to obvious danger solely to rescue property, he cannot recover if he is injured in his attempt. *Power Co. v. Hodges* (Tenn.) 70 S. W. 616, 60 L. R. A. 459.

It is contended here that the intestate had reached a place of safety, that he had escaped from the building and from all danger, and that his return to the burning building was voluntary and unnecessary on his part. If those facts be true, then the plaintiff cannot recover, unless he can show that in voluntarily returning into the burning building, from which he had safely escaped, his intestate acted with such care and caution as a reasonably prudent man would have exercised under such circumstances. The burden of proof is upon the plaintiff, not only to show negligence upon the part of defendant, but that the death of his intestate was proximately caused by such negligence. If it be proven that the intestate had escaped from the burning building and had reached a place of safety, the defendant is absolved from liability for his death, unless the plaintiff replies by showing that intestate re-entered the burning building for the purpose of saving his employer's property, and that at the time he did so a reasonably prudent person might well have done the same thing.

In his instruction No. 22 the court below imposed only one limitation upon the right of an employee to recover his employer's property endangered by fire, viz., he must not act recklessly. "Reckless" is defined to be "desperately heedless." Century Dict. To be reckless is to be regardless of consequences. It is more than carelessness. It implies willfulness. Any conduct that falls short of recklessness would therefore, in his honor's opinion, not bar a recovery. We cannot concur in that view. The instruction was erroneous. Had human life been imperiled, it is more than doubtful if the instruction would have been warranted in *favorem vitæ*, but certainly not in the case of mere property. *Power Co. v. Hodges*, *supra*; *Plummer v. Kansas City*, 48 Mo. App. 484; *La Fayette Railroad v. Adams*, 26 Ind. 76. There is nothing in *Burnett v. Railroad*, 132 N. C. 261, 43 S. E. 797, relied on by plaintiff, which at all conflicts with the views herein expressed.

As the case goes back for a new trial, it is unnecessary to discuss the other exceptions.

Error.

SAN ANTONIO TRACTION COMPANY, Plff. in Err., v. GEORGE A. ALTGELT.

(Argued December 13, 1905. Decided January 22, 1906.)

[26 Sup. Ct. Rep. 261.]

Municipal Corporations—Legislative Control—Power to Charter Street Railway.—The power to charter a street railway was not withdrawn from the legislature by Tex. Const. 1876, art. 10, § 7, providing that "no law shall be passed by the legislature, granting the right to construct and operate a street railway within any city, town, or village, or upon any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by said railway," but such power still exists, provided the consent of the local authorities be first acquired.

Constitutional Law—Impairment of Contract Obligations—Legislative Regulation of Street Railway Rates.—The requirement that street railway companies shall issue half-fare tickets to school children, which is made by Tex. act April 10, 1903, § 2, does not impair the obligation of any contract with the municipality, fixing the rates which such company might charge, entered into after the adoption of Tex. Const. 1876, which, by § 17 of the Bill of Rights, subjects to the control of the legislature all privileges and franchises granted by it or created under its authority.

Constitutional Law—Impairment of Contract Obligations—Legislative Regulation of Street Railway Rates.—Any contract exemption from legislative regulation of rates, possessed by a street railway company chartered before the adoption of the Texas Constitution of 1876, which, by § 17 of the Bill of Rights, subjects to the control of the legislature all privileges and franchises granted by it or created under its authority, was lost by the sale of its property on foreclosure, and the acquisition of its franchise, under a municipal ordinance, together with that of another company, by a new corporation, incorporated since the adoption of such Constitution, although such ordinance provides that all the rights and privileges previously granted to the old corporations were conferred on the new one, including all the limitations, contracts, and obligations.

In error to the Court of Civil Appeals for the Fourth Supreme Judicial District of the State of Texas to review a judgment affirming a judgment of the District Court of Bexar County, awarding a peremptory mandamus to compel a street railway company to issue half-fare tickets. Affirmed.

See same case below (Tex. Civ. App.) 81 S. W. 106.

Statement by MR. JUSTICE BROWN:

This was a petition by Altgelt, suing by his next friend, originally filed in the district court of Bexar county, for a peremptory mandamus against the traction company, a Texas corporation operating a street railway system, commanding it to issue to the plaintiff twenty half-fare street car tickets upon the payment of 50 cents, the same being at the rate of 2½ cents per ticket.

Both parties relied upon the legal effect of certain legislation of the state of Texas hereafter set forth. The mandamus was granted by the district court, whose action was affirmed by the

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court of civil appeals. An application for a writ of error from the supreme court was denied.

Mr. Charles W. Ogden for plaintiff in error.

No counsel for defendant in error.

MR. JUSTICE BROWN delivered the opinion of the court:

This case depends upon the construction and validity of certain legislative acts of the state of Texas from 1874, the date of the original charter, to 1903, the date of the act complained of as an impairment of the traction company's contract.

The Constitution of 1869, in force at the time the original company was chartered, contained no limitation upon the power of the legislature to grant franchises in towns, cities, and other subdivisions of the state. The San Antonio Street Railway Company was incorporated in 1874 by special act, in which it was provided, § 8, that "all contracts made and entered into between the mayor and aldermen of the city of San Antonio and said company, or any privileges and rights granted * * * to said company, shall be in all respects legal and binding on the aforesaid contracting parties;" and by § 9, that the charter "shall remain in full force and effect for the period of fifty years."

By ordinance of the city council of October 5, 1875, privilege was granted to the San Antonio Street Railway Company to construct a first-class horse railway, during the term of its charter, upon the streets of said city, upon certain routes; but the ordinance did not fix the rate of fare to be charged for the transportation of persons over its projected lines.

By article 10, § 7, of the Constitution of Texas of 1876, it was provided that "no law shall be passed by the legislature granting the right to construct and operate a street railway within any city, town, or village, or upon any public highway, without first acquiring the consent of the local authorities having control of the street or highway proposed to be occupied by said railway."

Section 17 of article 1 of the Bill of Rights of the same Constitution provides that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof."

On March 16, 1899, twenty-three years after the adoption of this Constitution, an ordinance of the city was passed, granting an extension of time to the San Antonio Street Railway, and the San Antonio Edison Company, and imposing certain limitations upon the exercise of their franchises, among which was that "said street railway companies shall charge 5 cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other."

It was also provided, by § 11 of the same ordinance, that "the rights, privileges, and franchises, or either of them herein re-

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ferred to and hereby extended, may be assigned by the grantee or grantees to any person or corporation, and the limitations of this ordinance shall apply to the assignee thereof."

On April 4, 1900, all the property of this company was sold under the decree of a state court to a trustee for the stockholders, subject to the payment of the debts of the company, and to the performance of all outstanding contract obligations, which were declared "a preference lien" against all the property sold in the hands of the purchaser. The conveyance expressly stipulated that "within the meaning of the words 'contract obligations' shall be understood any and all existing contracts of the said Antonio Street Railway Company for street railway service over its road, or any portion thereof, had with any person or persons, now binding on said street railway company."

On August 7, 1900, the common council of the city passed an ordinance reciting the sale of the property and privileges of the former corporations, the San Antonio and Edison Companies, to the traction company, and enacting that all the rights and privileges theretofore granted to the former companies, which were said to be "now defunct," with all the limitations, duties, contracts, and obligations imposed and required of the said San Antonio Street Railway Company, were imposed upon the traction company. This ordinance was accepted.

The legislation remained in this condition until April 10, 1903, when the legislature of the state passed a new act, the 2d section of which reads as follows:

"Sec. 2. All such persons or corporations owning or operating street railways shall sell or provide for the sale of tickets in lots of twenty, each good for one trip over the line or lines owned or operated by such person or corporation, at and for one half the regular fare or charge collected for the transportation of adult persons, to students not more than seventeen years of age, in actual attendance upon any academic public or private school, of grades not higher than the grades of the public high schools of this state, situated within or adjacent to the town or city in which such street railway is located. Such tickets are required to be sold only on the presentation by the student desiring to purchase the same, of the written certificate of the principal of the school upon which he is in attendance, showing that he is not more than seventeen years of age, is in regular attendance upon such school, and is within the grades hereinbefore provided. Such tickets are not required to be sold to such students, and shall not be used, except during the months of the year when such schools are in actual session, and such students shall be transported at half fare only upon the presentation of such tickets."

It is insisted by the plaintiff in error that, under article 10, § 7, of the state Constitution, above quoted, the power to grant to street railways the property rights and franchises to con-

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struct and operate a street railway within a city is withdrawn from the legislature, and conferred; if not by express words, then by necessary implication, upon the municipal authorities. We do not so read the section. It merely provides that no such law shall be passed by the legislature, granting the right to construct and operate a street railway, without first acquiring the consent of the local authorities; but we see nothing to prevent the legislature from chartering a street railway, provided such consent be acquired. Such we understand to be the ruling of the supreme court of that state in *Taylor v. Dunn*, 80 Tex. 659, 16 S. W. 732, and *Houston v. Houston City Street R. Co.*, 83 Tex. 548, 29 Am. St. Rep. 679, 19 S. W. 127. But whether an act of the legislature be necessary to charter a street railway is not involved in this case, as we are cited only to the original charter of the San Antonio Street Railway Company of 1874; although it is clear that a new charter would be inoperative to authorize the construction of the road without the consent of the municipal authorities.

Assuming, but not deciding, that the ordinance of March 16, 1899, extending the franchise of the San Antonio Street Railway, and imposing certain limitations, constituted a contract pro tanto the question still remains whether the provision "that said street railway companies shall charge 5 cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other," constituted a contract with respect to which no further legislation upon that subject could be enacted without impairing its obligation. Even if construed as a contract, it was still subject to the provision of the Constitution of 1876, which, in § 17 of the Bill of Rights, declared that no irrevocable or uncontrollable grant of special privileges or immunities should be made; but that all privileges granted by the legislature or created under its authority shall be subject to the control thereof.

An important consideration in this connection is that the alleged contract was made twenty-three years after the Constitution of 1876 was adopted, declaring that all privileges granted by the legislature shall be subject to its control. Clearly, it was not deprived of that control by the fact that the contract was not entered into by the legislature itself, but by a municipal corporation, since that is but an agency of the state, to which is delegated the power to regulate street railways and other municipal franchises. We have repeatedly held that where a railway was originally chartered before a new constitution took effect (and hence such charter was not limited thereby), yet, if such road be subsequently consolidated with other roads, or accepts new privileges, after a new constitution takes effect, all contracts, privileges, and franchises conferred after the adoption of such constitution are subject to its provisions. *Shields v. Ohio*, 95 U. S. 319, 24 L. Ed. 357; *Maine C. R. Co. v. Maine*, 96 U. S. 499, 24 L. Ed. 836; *Atlantic & G. R. Co. v. Georgia*,

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98 U. S. 359, 25 L. Ed. 185; Keokuk & W. R. Co. v. Missouri, 152 U. S. 301, 38 L. Ed. 450, 14 Sup. Ct. Rep. 592; Yazoo & M. Valley R. Co. v. Adams, 180 U. S. 1, 23, 45 L. Ed. 395, 407, 21 Sup. Ct. Rep. 240.

In this case not only did the original San Antonio Street Railway Company become extinct by the foreclosure and sale of its property, but, under the ordinance of August 7, 1900, declaring the prior companies to be "now defunct," the traction company also became the owner of all the property, assets, rights, and privileges of another company, known as the San Antonio Edison Company, which thus became absorbed with the street railway company in the new corporation known as the traction company, which is admitted to have been incorporated since 1876, though the charter is not in the record. We are clearly of the opinion that, under these circumstances, it received its franchise under the Constitution of 1876, which forbade either the legislature or the municipal authorities to make any irrevocable contract.

It is true that in this ordinance it was provided that all rights and privileges previously granted to the street railway company and the Edison company were conferred unto the traction company, including all the limitations, contracts, and obligations; but this ordinance must be construed in connection with the Constitution of 1876, which made all such privileges and franchises subject to the control thereof. Such was the view taken by the court of civil appeals of Texas in this case, which expressly waived the question whether the provision of the former ordinance fixing a 5 cent fare constituted a contract or not, declaring that if it did, it was subject to further legislative control.

Under the Bill of Rights of that Constitution, the legislature could not reduce the fares to a confiscatory amount, or to an amount which would render it unprofitable to operate the road. There is no allegation of that kind in this bill, and no evidence that the reduction of the school tickets in question would seriously impair its revenues. Indeed, it was found in the opinion of the court below that it was not contended there, and that there was nothing in the evidence tending to show, that the rate of fare claimed by the appellee under the act of 1903 is not such as to leave to the company a sufficient income to pay for repairs and a fair income on its investment.

The judgment of the Court of Civil Appeals is affirmed.

SOUTHERN PACIFIC COMPANY, ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, SANTA FE PACIFIC RAILROAD COMPANY, and SOUTHERN CALIFORNIA RAILWAY COMPANY, Appts., *v.* INTERSTATE COMMERCE COMMISSION. SOUTHERN CALIFORNIA RAILWAY COMPANY, Appt., *v.* INTERSTATE COMMERCE COMMISSION. ATCHISON, TOPEKA, & SANTA FE RAILWAY COMPANY, Appt., *v.* INTERSTATE COMMISSION et al. SANTA FE PACIFIC RAILROAD COMPANY, Appt., *v.* INTERSTATE COMMERCE COMMISSION et al. SOUTHERN PACIFIC COMPANY, Appt., *v.* INTERSTATE COMMERCE COMMISSION.

(Argued January 23, 24, 1906. Decided February 26, 1906.)

[26 Sup. Ct. Rep. 330.]

Carriers—Federal Regulation—Routing by Initial Carrier.—Nothing in the provisions of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, pp. 3154-3165), § 6, requiring joint traffic rates, when agreed upon, to be filed with the Interstate Commerce Commission, and made public when required, and empowering the Commission to prescribe forms of schedules of such rates, forbids the adoption by common carriers, as part of an agreement for a through rate from California to the East, for oranges and other citrus fruits, of a rule under which the right of routing beyond its own terminal is reserved to the initial carrier as the condition of guaranteeing the through rates to the shipper, where such rule has served, as was intended, to break up rebating by the connecting lines, and, in its practical operation, the actual routing is generally conceded to the shipper; and his requests to divert shipments en route are usually allowed.

Carriers—Federal Regulation—Discrimination—Routing by Initial Carriers.—A discrimination forbidden by the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, pp. 3154-3165), § 3, is not made by the adoption by common carriers, as part of an agreement for a through rate from California to the East, for oranges and other citrus fruits, of a rule under which the right of routing beyond its own terminal is reserved to the initial carrier as the condition of guaranteeing the through rates to the shipper, where such rule has served, as was intended, to break up rebating by the connecting lines, and, in its practical operation, the actual routing is generally conceded to the shipper, and his requests to divert shipments en route are usually allowed.

Commerce—Enforcement by Courts of Orders of Interstate Commerce Commission.—The enforcement of an order of the Interstate Commerce Commission directing common carriers to desist from maintaining or enforcing a rule adopted by them may be decreed by a Federal circuit court if it finds such rule is, for any reason, in violation of the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, pp. 3154-3165), although such reason may not have been the one relied upon by the Commission itself to invalidate the rule.

Carriers—Federal Regulation—Pooling—Routing by Initial Carrier.—The pooling of freights of competing railroads, forbidden by the act of February 4, 1887 (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, pp. 3154-3165), § 5, is not accomplished by the adoption by common carriers, as part of an agreement for a through rate from California to the East, for oranges and other citrus fruits, of a rule under which the right of routing beyond its own terminal is reserved to the initial carrier as the condition of guaranteeing the

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through rates to the shipper, even though the initial carrier promises fair treatment to the connecting lines, and carries out such promise, where such rule has served, as was intended, to break up rebating by the connecting lines, and, in its practical operation, the actual routing is generally conceded to the shipper, and his requests to divert shipments en route are usually allowed.

Appeals from the Circuit Court of the United States for the Southern District of California to review a decree for the enforcement of an order of the Interstate Commerce Commission requiring carriers to desist from maintaining or enforcing a rule under which initial carriers, as a condition of guaranteeing a through rate, were given the right to designate the route beyond their own terminals. Reversed and remanded with instructions to dismiss the bill.

See same case below, 132 Fed. 829.

Statement by MR. JUSTICE PECKHAM:

These are appeals from orders or decrees of the circuit court of the United States for the southern district of California, in proceedings wherein that court affirmed, and ordered to be enforced, the determination of the Interstate Commerce Commission, relating to the above-named railroad companies, directing them to desist from maintaining or enforcing a rule adopted by them and pertaining to shippers of oranges and other citrus fruits in southern California, whereby those shippers were denied their alleged right of designating the routes for the transportation of their property from California to the Eastern markets, under a tariff of through rates, as mentioned in the orders or decrees.

The proceeding in each case was commenced before the Commission under §§ 13, 14, and 15 of the interstate commerce act (24 Stat. at L. 379, chap. 104, U. S. Comp. Stat. 1901, pp. 3154-3165), by the filing of a petition with the Commission, on the part of certain corporations of the state of California, called the Consolidated Forwarding Company, and the Southern California Fruit Exchange, engaged in the business of shipping oranges and other citrus fruit from southern California to the Eastern markets. The proceeding was continued in the circuit court under § 16 of the act. The petition charged the railroads with various violations of the interstate commerce act, including specially the agreement for "routing," hereinafter set forth, and asked the Commission to enjoin such companies from any further violation of the act. The companies put in answers to the petition, denying its material averments.

Testimony was then taken before the Commission, and the following, among other facts, were shown:

The through tariff of rates from California to the East, with the right of routing, which had been agreed upon between the companies complained of (hereinafter called the initial carriers) and their Eastern connections regarding the orange and other citrus fruit transportation, was in force January 1, 1900, and these proceedings were commenced February 26, 1900.

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Before the adoption of the rule for routing, there had been among the Eastern connections of the initial carriers under the through joint tariff rates then existing, the greatest rivalry to obtain the California fruit freight business; and this rivalry led, on the part of the connecting carriers, to a system of rebates from the through tariff rates, which was a clear violation of the commerce act, and was demoralizing in every way to honest business. Indeed, the president of one of complainants before the Commission admitted that his company (the Southern California Fruit Exchange) had in four years received rebates to an amount of over \$174,000. The practice had become so general that the shippers came to regard a rebate as part of the legitimate returns from the orange business. Among those who participated in this system of rebates were what is termed the car line companies, which were incorporated companies owning cars in which the fruit was packed, described as ventilator or refrigerator cars, which were peculiarly adapted to the carriage of the fruit, and were hired by the initial carriers because they did not want to own equipment cars which they could keep in service only part of the year, while the car companies could use the cars for other purposes in other parts of the United States when the orange transportation was over. These car companies made arrangements with the connections of the initial carrier east of Chicago and New Orleans, by which a certain bonus, varying from \$10 to \$40 per car, was given the car line companies, in consideration of the car being routed over the line paying the bonus, a part of the bonus, varying from a quarter to a half, being usually turned over to the shipper by the car company, for the privilege allowed the latter of routing the shipment.

The initial carriers form two systems,—one called the Southern Pacific System, and the other the Santa Fe System. There are numerous points of junction on these lines of the defendants, where connection is made with other carriers, and at their termini in Chicago, Ogden, and New Orleans such connection is made, and through lines are formed over which the citrus fruit is transported to practically all the markets of the United States. The two systems are the only ones which reach the section of country where the orange industry in Southern California exists, and they about equally divide the transportation of the oranges therefrom. The Commission said the evidence was unsatisfactory as a basis for a conclusion whether the initial carriers pooled their citrus fruit traffic or divided the earnings therefrom; and it therefore retained such question for further hearing and investigation.

Prior to January, 1900, the rebates by the Eastern companies, already referred to, had become so great and demoralizing that the initial carriers at length determined to try and crush the whole thing. The connecting carriers were themselves dissatisfied with this state of things, but each felt it necessary in order

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to compete with the others. It had been assumed that the car line companies were not common carriers, and were not within the commerce act, and therefore they were more ready to indulge in the practice of getting rebates whenever they could, and paying part of the amount to the shippers for giving them the right to route the shipment. Prior to the adoption of the through rate tariff with this rule under discussion, the shippers had been permitted by the initial carriers to control the routing of the freight, and also to divert it, en route, from the destination point named in the bill. In order to stop the rebating on these joint through rates it was proposed to agree upon a through rate tariff, to be assented to and accepted by the railroads interested in the fruit transportation, or by as many of them as possible, with the rule in question to form part of the agreement. Such a tariff agreement was made between some of the roads (and subsequently assented to and joined in by most of the roads) and filed with the Commission, for the transportation of oranges and other citrus fruit from Southern California at \$1.25 per hundred pounds, to practically all points east of the Missouri river. The tariff agreed upon by the companies contains the rule complained of, which is part of such agreement, and by it the initial carriers agreed to guarantee the through rates to the shipper, but only on the following conditions:

"In guaranteeing the through rate named herein, the absolute and unqualified right of routing beyond its own terminal is reserved to initial carrier giving the guaranty. In accordance with this rule, agents will not accept shipping orders or other documents, if routing instructions are shown thereon. Neither will agents accept verbal routing instructions."

Another rule reads:

"Initial carrier will route each car from point of origin to point of destination, and diversions in transit will not be permitted except by consent of initial carrier, who will thereupon designate new routing when diversion necessitates change therein."

Notwithstanding the rule thus published in regard to routing, the initial carriers generally thereafter permitted the shippers to route the cars containing their fruit as they desired. The right to divert freight from the destination point or route named in the bill of lading, and before the freight reached the billed destination, had been exercised generally by shippers, and had been allowed by the carriers throughout the country, and the practice was regarded of value to the shippers, as it enabled them sometimes to realize higher prices than they otherwise might if the freight were continued to the original destination. This diversion by the shippers also continued to be generally allowed.

The reason for the rule, reserving to the initial carrier this right to route the traffic, is stated to have been because it en-

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abled the initial carriers to secure the discontinuance of the practice of paying rebates. Since the adoption of that rule the rebates which had been paid to shippers and to owners of car lines were discontinued, and the Commission says there is no evidence that the practice has been resumed. They were discontinued for the obvious reason that the shippers could not control the route, and hence it would be useless for the Eastern railroad company to pay the shippers or the car line companies rebates on freight the Eastern company might not receive, and which the initial carrier alone had the routing of. As soon as the routing was agreed upon and the through tariff rates fixed, the Eastern connections had to do business with the initial carriers instead of the car company or the shipper. The shippers prepay or guarantee freight charges to destination. The initial carrier does not assume liability from damage resulting from negligence of any connecting line.

The Commission (the chairman, Mr. Commissioner Knapp, dissenting) ordered the defendants to cease from exacting from the shippers the right to themselves make the route which the freight should take. The ground taken by the Commission was that such routing by the initial carriers subjected the shippers to undue, unjust, and unreasonable prejudice and disadvantage, and gave to the carrier an undue and unreasonable preference and advantage, and was a violation of the 3d section of the act.

The initial carriers, believing the Commission had erred in its decision, refused to obey the order which it made, and thereupon the Commission, pursuant to the 16th section of the act, filed its bill in the circuit court for the purpose of enforcing its order.

The bill thus filed by the Commission was demurred to by the defendants, and the demurrer was overruled. 123 Fed. 598.

The railroad companies then answered, and the case, after the taking of further evidence, came up for final hearing, when the order of the Commission was affirmed and directed to be enforced (132 Fed. 829), although the circuit court put the affirmance on the ground that the agreement as to routing showed that there was a violation of § 5 of the interstate commerce act, in that such agreement amounted to a contract or combination for the pooling of freights. The court passed upon no other question raised in the case. A very full statement of facts is contained in the report in 132 Fed. supra.

A motion was made for a supersedeas pending the hearing of this appeal, which, for the reasons stated in the opinion of the circuit court, was denied. 137 Fed. 606.

Messrs. *Maxwell Evarts*, *Robert Dunlap*, *R. S. Lovett*, *Thomas J. Norton*, and *Gardiner Lathrop* for appellants.

Messrs. *L. A. Shaver* and *Joseph H. Call* for appellee.

MR. JUSTICE PECKHAM, after making the foregoing statement, delivered the opinion of the court:

Although there are separate proceedings in these various

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cases, the question arising in all is identical, and the cases will hereafter be spoken of as if there was but one proceeding before the court. The single question presented is, Has the carrier that takes the fruit from the shipper in California the right, under the facts herein, to insist upon the rule permitting such carrier to route the freight at the time it is received from the shipper?

The Commission has decided that the carrier has not the right, and that the rule denies to shippers the use of their transportation facilities, which such shippers are entitled to, and that, in its application by the initial carriers to the fruit traffic, the shippers are subjected to undue, unjust, and unreasonable prejudice and disadvantage, and the carriers are given an undue and unreasonable preference and advantage. If this be the necessary effect of the rule, it may be assumed to be a violation of § 3 of the interstate commerce act, and the Commission, therefore, rightfully ordered the carriers to desist from observing it.

By § 16 of the act, the circuit court is given authority to enforce "any lawful order or requirement of the Commission." If the order be not a lawful one, the court is without power to enforce it. Whether or not such order was lawful is the matter to be determined.

The Commission does not find that any contract existed between the initial carrier and its Eastern connections to bill the fruit according to certain proportions among the connecting railroads. The Commission said:

"The situation warrants the inference, however, that these two initial carriers or systems, connecting with other carriers at various points, and they, in turn, connecting with numerous other carriers, as shown by the tariff, are able, by acting in concert, and routing as they see fit, to only send traffic over the roads of such carriers as fulfilled an agreement to refrain from making any rate concession to the shippers, and some influence of like character could doubtless be exerted by them upon the car lines which are also hereinafter referred to."

Such statement simply shows that if any Eastern railroad with which an agreement for joint through rates existed should give rebates on the joint through rate tariff, thus carrying freight below the rates agreed upon as the through rate tariff, that road would not get the freight.

We see nothing in the initial carrier endeavoring to maintain the rates agreed upon as a through rate tariff, and thereby preventing the payment of rebates, which in itself is a violation of the act. The act especially prohibits, in the 6th section, any alteration of the rates agreed upon, in favor of any person or persons. There is no finding that there has in fact, as a result of the rule, been any discrimination or unjust action as between the initial carriers and the shippers themselves, and there is no evidence that any was ever practised.

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In the examination of the rule it is well to bear in mind the situation of the companies and the business at the time of its adoption. It is fully set forth in the foregoing statement of facts. The payment of the rebates was a shame, and was in truth unsatisfactory to all the railroads, besides being plainly a violation of the commerce act.

We think there is nothing in the act which clearly prohibits the roads from adopting the rule in question. The decision turns upon the construction of a statute which at least does not in terms prohibit.

In cases such as this a court is bound to consider the bearing of the result of either construction upon the general purposes of the act. In enacting the commerce act this court has stated that the object of Congress was to facilitate and promote commerce by the adoption of regulations to make charges for transportation just and reasonable, and to forbid undue and unreasonable preferences or discriminations. *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666.

The importance of the rule in this case, so far as the shipper is concerned, is not so great as is its importance to the railroads in preventing rebates. If the right of routing be looked at alone, without any connection with the claimed right of diverting the freight, the rule itself would be generally of little importance to the shipper. In all probability the freight gets to its destination when routed by the carrier as early as if routed by the shipper, and in that event the particular route taken is not very important to the latter. The evidence before the circuit court shows that the routing, when done by the carrier, was fairly apportioned among the Eastern connections, having an eye to good service and expedition, and the roads that the routing was done over were the best roads in the country; the roads that have been eliminated were the roundabout roads; there were no roads that were insolvent, so far as known by the witnesses. Now, as the fact appears that the actual routing is generally conceded the shipper, and also his request for a diversion allowed, there is nothing in the mere right of routing by the companies, separate from other facts, of which the shipper can properly complain. The Commission says it does not distinctly appear in testimony that a delivery by a particular terminal road has been denied in any particular case, yet the manifest evil results of an arbitrary application of the rule must be considered in determining its legality. If there is no such arbitrary application, we do not agree that the rule itself is to be held illegal because a violation of the act may be committed, while the evidence is that none in fact was committed. It does appear that the mere existence of the right to route on the part of the company has ended the practice of rebating. But the opportunity to obtain rebates on the part of the shipper is surely not a ground for action by the Commission or by the court.

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Of course, if, in attempting to cut off rebates, there is a violation of the act, the act must be followed, and that means of prohibiting them must be abandoned. Courts may well look with some degree of care before so construing a statute which confessedly does not in terms so provide, as to prohibit such a rule on the ground that it would be a violation of the statute. We are of opinion that the rule is not a violation thereof.

It is conceded that the different railroads forming a continuous line of road are free to adopt or refuse to adopt joint through tariff rates. The commerce act recognizes such right, and provides for the filing, with the Commission, of the through tariff rates, as agreed upon between the companies. The whole question of joint through tariff rates, under the provisions of the act, is one of agreement between the companies and they may, or may not, enter into it, as they may think their interests demand. And it is equally plain that an initial carrier may agree upon joint through rates with one or several connecting carriers, who, between each other, might be regarded as competing roads.

It is also undoubted that the common carrier need not contract to carry beyond its own line, but may there deliver to the next succeeding carrier, and thus end its responsibility, and charge its local rate for the transportation. If it agree to transport beyond its own line, it may do so by such lines as it chooses. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 28 L. Ed. 291, 4 Sup. Ct. Rep. 185; *Louisville & N. R. Co. v. West Coast Naval Stores Co.*, 198 U. S. 483, 49 L. Ed. 1135, 25 Sup. Ct. Rep. 745. This right has not been held to depend upon whether the original carrier agreed to be liable for the default of the connecting carrier after the goods are delivered to such connecting carrier. As the carrier is not bound to make a through contract, it can do so upon such terms as it may agree upon; at least, so long as they are reasonable and do not otherwise violate the law. In this case, the initial carrier guarantees the through rate, but only on condition that it has the routing. It was stated by the late Mr. Justice Jackson of this court, when circuit judge, in the case of *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 3 Inters. Com. Rep. 192, 43 Fed. 37, as follows:

"Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate, so as to give undue preference or advantage, or subject to undue prejudice or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of their business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are recognized as sound, and adopted in other trades and pursuits."

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This statement was approved by this court in Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission, 162 U. S. 184-197, 40 L. Ed. 935, 939, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700.

Having this right to agree on a joint through tariff on terms mutually satisfactory, we cannot find anything in the commerce act which forbids the agreement with such a condition therein as to routing. It is said that the 6th section, properly construed, prohibits such condition. We confess our inability to find anything in that section which does so.

The fact that the rate, when agreed upon, must be filed with the Commission, and made public by the common carriers when directed by the Commission, does not prevent the adoption of an agreement for a through rate tariff with the condition as stated. Nor does the provision granting power to the Commission to prescribe forms of schedules of rates, as provided for in the 6th section, have any such effect. Where there is an agreed through rate tariff, and as part of such agreement, which is joined in by several railroads, the right to route cars is reserved to the initial carrier, we do not think that the shipper, by virtue of the 6th section, has the right to ignore the condition which is part of the agreement under which the through rate is made and is guaranteed.

We cannot see that the rule violates the 3d section of the act. All the facts referred to by the Commission are nothing but statements as to how, under such a rule, there might occur a violation of that section, but we find nothing in the facts stated by the Commission, showing that such violation had occurred. In truth, the companies did not always even enforce the rule; still less did they discriminate against shippers or in favor of carriers. On the contrary, the Commission stated that "while the initial carriers do not always route as requested by the shippers, they generally comply with their request." The mere failure to do so does not, however, prove a violation of the section.

The right to route is also complained of because the rule confined it to the fruit business, and therefore it was, as contended, a discrimination against those engaged in it or against the traffic itself. The transportation of this fruit is a special business; large interests are involved in it, and particular pains are taken to transport it as speedily as possible. With regard to all other freight it has substantially nothing in common. The cases are wholly unlike, and there has been no proof or complaint as to rebates being given in connection with other freight, and the witnesses for the railroad state if there were any evidence or complaint of such rebates, the same rule as to routing would be immediately adopted. As has been said, there is no pretense of discrimination under this rule between the shippers of freight themselves. There seems to be unanimous agreement that all shippers are treated alike and are

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granted the same privileges, and the routing is generally accorded them. It is the power to route, which rests with the initial carrier, that really takes away the motive for a rebate in the manner indicated, and, therefore, the granting of the request of the shipper as to a particular route may be, and is, generally conceded without danger that the rebate business may be again practised.

The important facts that control the situation are that the carrier need not agree to carry beyond its own road, and may agree upon joint through tariff rates or not, as seems best for its own interests. Having these rights of contract, the carrier may make such terms as it pleases; at least, so long as they are reasonable and do not otherwise violate the law. We think the routing rule is not unreasonable under the facts herein, and that it does not violate the 3d section of the act.

Because opportunities for the violation of the act may occur by reason of the rule is no ground for holding, as a matter of law, that violations must occur, and that the rule itself is therefore illegal. We are, consequently, unable to concur in the view taken by the Commission that the rule violates the 3d section of the act.

Upon the proceeding before the circuit court, that court did not pass upon the question decided by the Commission, but held that the routing rule agreed to between the initial carrier and the various Eastern companies, and forming a part of the subsequent joint through tariffs which were filed with the Commission, was in itself a contract or combination for the pooling of freights.

The defendants objected that the circuit court had no authority to decree the enforcement of the order upon any other ground than that taken by the Commission itself. We think that the court was not confined to those grounds, and if it found the rule was, in itself, for any reason illegal as a violation of the act, the order might be valid and be a lawful order, although the Commission gave a wrong reason for making it. If it held the rule to be a violation of one section, the order to desist might be valid if, instead of the section named by the Commission, the court should find that the rule was a violation of another section of the act. All the facts being brought out before the Commission or the court, the court could decide whether the order was a lawful one, without being confined to the reasons stated by the Commission. We therefore look to see the ground taken by the circuit court.

That court found that the rule was adopted to uphold their published rates; or, in other words, to maintain the rates on the joint through tariff. Although, under the previous through rate tariff, these rates had been secretly cut by the Eastern connections of the initial carriers, yet, when the routing rule was agreed to as part of the through rate tariff, these rebates ceased. Hence, as the court said, the purpose of the rule was undoubtedly

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to maintain the through rate tariff, and that it was effectual. But the court held, as a result, that this routing provision, being part of the through rate tariff agreed to by the various Eastern roads, made a contract among those roads for the pooling of freights on competing railroads within the meaning of § 5 of the commerce act. It held that it was not necessary, in order to form a pool, in violation of that section, that the contract or agreement should fix the percentages of freight the several railroads were to receive, or that the railroads should know in advance what the percentages should be; that it was sufficient to constitute a pool if the contract or agreement provided for special means or agencies for apportioning freights, which would destroy the rivalry which would otherwise exist between the competing railroads; and an agreement by which the apportionment was left to the will of the initial carrier accomplished that purpose as effectually as though definite percentages were fixed in the contract; that defendant's plan to maintain through rates through the operation of the routing rule necessarily destroyed competition, and the adoption of the routing rule put the shippers in a position where their patronage could not possibly be competed for by the defendant's Eastern connections.

Thus the mere fact that the initial carrier was granted by this through tariff agreement the right to route the freight was held to result in the formation of a pool, in violation of the 5th section of the act. There was no other agreement proved in the case. It is stated by the Commission that the shipments are forwarded by the initial carrier so as to give certain percentages of the traffic to connecting lines. At the same time the Commission finds that initial carriers generally comply with the request of the shippers to route the freight as desired. The substance of the report of the Commission is, therefore, that there is a certain percentage of the traffic given the connecting carriers when there is no request for routing given by the shippers. It amounts to the giving of fair treatment to the connecting carriers. It is true the Commission calls this a tonnage pool between the connecting carriers, to which the initial carriers give effect by their routing arrangement, and that its object was not so much to prevent rebates, which was but an incident, as to affect the tonnage division. We are of opinion, however, that the evidence is substantially one way, and that is, that the arrangement for routing was to break up rebating, and that it has been accomplished. The evidence before the circuit court was to the effect that there was no agreement whatever with the eastern connections that any of them should have any particular proportion of the freight, but the Eastern roads entered into the routing agreement because they were satisfied that it would be better than the then present practice of rebating, and they thought that they would get a fair share of the business; or, in other words, would be fairly treated by the initial carriers, who gave them to understand

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that they would be so treated. The tonnage pool was, as the witnesses said, a myth; and it was testified to that there was not one of the Eastern companies that knew what percentage of the whole business that company secured. They simply knew that the through rates were maintained under the operation of the routing agreement and that rebating ceased; and they were satisfied with the manner of their treatment by the initial carrier.

The circuit court, in order to arrive at its result, necessarily treated the connecting carriers as rival and competing transportation lines for this freight, and assumed that between these lines there would exist, but for the routing agreement, a competition for the fruit transportation which could not be extinguished by any agreement as to routing, as a condition for making through tariff rates; that as competition was destroyed by this rule, it was idle to say that such result was not intended by the defendant, and so it was held that the carrying out of the routing agreement violated the act.

We think these various roads were really not competing roads within the meaning of the 5th section of the commerce act, when the facts are carefully examined. That act recognizes the right of the carriers to agree upon, and provides for the publication of, joint through tariff rates between continuous roads, on such terms as the roads may choose to make, provided, of course, the rates are reasonable, and no discrimination or other violation of the act is practised. The initial carrier did not, on its line, reach the Eastern markets, but it reached various connecting railroads which did reach those markets. The initial carrier had the right to enter into an agreement for joint through rates with all or any one of these connecting companies, though such companies were competing ones among themselves. And the agreements could be made upon such terms as the various companies might think expedient, provided they were not in violation of any other provision of the act.

Prior to the adoption of the routing rule these connecting railroads were already acting under a through rate tariff which continued up to the time when the agreement for the routing was adopted. When so acting it was no longer possible to compete with each other as to rates (and it is upon the rebates as to rates that this whole controversy is founded) provided the companies fulfilled their joint rate tariff agreements. The only way the rate competition could exist under the through rate tariff was by violating the law. This, unfortunately, was habitually done, and during that time the competition consisted in a rivalry between these roads as to which would be the greatest violator of the law by giving the greatest rebates.

In truth, the only way in which these connecting lines could legally become competing railroads for this California fruit trade would be in the absence of all joint tariff rate agreements. The moment they made such agreements, and carried them out, rate competition would cease.

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All that would be needed for the total suppression of rate competition among the connecting railroads would be the honest fulfillment of their agreement as to joint through rates. And just here is where they failed and where they violated their agreement and the law by granting rebates; or, in other words, by competing, as to rates, for the freight, in violation of the joint rates. In such case we do not see any violation of the pooling section of the act, by putting in the agreement for joint through rates the provision for routing by the initial carrier. It achieved its purpose and stopped rebating, although it thereby also stopped rate competition which, in the presence of the through rate tariff, was already illegal. The railroads are no longer rate-competing roads after the adoption of a through rate tariff by them, and they have no right to privately reduce their rates.

Now, while the most important, if not the only, effect of the routing agreement is to take away this rebating practice, and to hold all parties to that agreement as part of the joint through rate tariff, we think no case is made out of a violation of the pooling provision in the 5th section of the act, even where the initial carrier promises fair treatment to the connecting roads, and carries out such promises.

We must remember the general purpose of the act, which is, as has been said, to obtain fair treatment for the public from the roads, and reasonable charges for the transportation of freight, and the honest performance of duty, with no improper or unjust preference or discrimination. Under such circumstances, the court ought not to adopt such a strict and unnecessary construction of the act as thereby to prevent an honest and otherwise perfectly legal attempt to maintain joint through rates, by destroying one of the worst abuses known in the transportation business. The effort to maintain the published through joint tariff rates is entirely commendable.

We think that the agreement in question, upon its face, does not violate any provision of the commerce act, and there is no evidence in the case which shows that in fact there has been any such violation.

The decree of the Circuit Court is reversed and the case remanded with instructions to dismiss the bill.

Reversed, etc.

HUTCHISON v. SOUTHERN RY. CO.

(Supreme Court of North Carolina, Nov. 28, 1905.)

[52 S. E. Rep. 263.]

Railroads—Operation—Train Service—Regulations—Reasonableness.*—A regulation established by a railway company, providing that certain trains shall not stop at all stations, is reasonable, provided there are enough trains to serve the purposes of local travel.

Carriers—Passengers—Contract of Transportation—Discharging Passenger at Destination.—Where a person having a ticket calling for a regular station as her destination was permitted without objection to take a train which did not stop at that station, and she did not know that the train did not stop there, and there was nothing on the face of the ticket to show that it was not good on that train, it was the duty of the company to stop the train at that station to permit her to alight.

Same—Carrying beyond Destination—Punitive Damages.*—A passenger, recklessly and willfully carried, against her protest, beyond her destination, may recover punitive damages, under Code, § 1963, providing that passengers shall be put off at the destination to which they have paid, and that carriers shall be liable to the party aggrieved for any neglect or refusal in the premises.

Appeal from Superior Court, Catawba County; Council, Judge.

Action by Mattie Hutchison against the Southern Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

S. J. Ervin, for appellant.

Self & Whitener and *Hufham & Williams*, for appellee.

CLARK, C. J. The feme plaintiff, a widow, bought a ticket from Hickory, N. C., to Liberty, S. C. The agent at Hickory told her she would make connection with the 1 p. m. train at Charlotte. On arriving at Charlotte, where she had to change cars, her train missed connection, and she took the next train, which left there at 10:20 p. m. This was a train which did not stop at all stations, Liberty being one of those at which, by the defendant's printed schedule, it did not stop; but the plaintiff testified that she was not aware of that fact, and no one so informed her. On the contrary, the conductor on the train, before getting to Charlotte told her she would miss connection, but that this 10:20 p. m. train from Charlotte would take her to Liberty that night; that in the 18 months previous she had

*For the authorities in this series on the question of the right to recover punitive or exemplary damages for wrongs to passengers, see foot-notes appended to *Peterson v. Middlesex & Somerset Traction Co.* (N. J.), 15 R. R. R. 672, 38 Am. & Eng. R. Cas., N. S., 672; *Dagnall v. Southern Ry. Co.* (S. Car.), 15 R. R. R. 59, 38 Am. & Eng. R. Cas., N. S., 59; *Southern Ry. Co. v. Lanning* (Miss.), 15 R. R. R. 1, 38 Am. & Eng. R. Cas., N. S., 1; foot-notes appended to *Pickett v. Southern Ry. Co.* (S. Car.), 14 R. R. R. 269, 37 Am. & Eng. R. Cas., N. S., 269; *Yazoo & M. V. R. Co. v. Mattingly* (Miss.), 14 R. R. R. 48, 37 Am. & Eng. R. Cas., N. S., 48.

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twice traveled on that same 10:20 train, and each time had been put off at Liberty; that soon after leaving Charlotte the conductor, on taking up her ticket, exclaimed in a loud, imperative, and commanding tone: "What are you doing in here? You have no business in here. Who told you to get on here?" He kept repeating this, rebuking her, and she was deeply humiliated. She says she asked him to give her back her ticket and put her off at the first station (Gastonia); that, if he had done this, she would have spent the night there, and have gone on in the daytime next morning to Liberty, but, instead of this, he kept the ticket and later came back again, rebuking her in a loud voice, heard distinctly all over the coach, telling her she had no business in there, and saying, "I want to know who told you to get on," adding that she knew the train did not stop at Liberty; that he spoke in a very ill-natured tone and loud voice; that she tried to reason with him, and again asked him to put her off at the first stop; that he came back the third time with the same loud, boisterous charges; that when she did not reply, being very nervous and humiliated, he "looked at her very furiously and said 'What if he didn't put me off there?'" To this she says she replied finally that she had paid her fare and did not deserve such indignities, and that he would hear from her; that at Gastonia he did not return her ticket, as requested, so she could stop; that he did not stop at Liberty, where her people were on the platform as she passed, having telegraphed her daughter from Charlotte that, having missed connection, she would be on that train, but she was carried past to Seneca, about 25 miles further on, where she was put out at 2:30 at night, and had to sit on the platform alone till 4:30, when she took the train back, reaching Liberty before daylight in a shattered, nervous condition, and walked in the dark up to her son-in-law's house alone, a half mile away, and was so exhausted by the nervous strain and exposure to the night air that she was ill, called in a physician, and was confined to her bed several days. The conductor, in his testimony, denied any discourtesy or rudeness, but says that he was polite and carried her on to Seneca because he suggested to her that she would get to Liberty 6 hours earlier by taking the north-bound train back than if she had stopped at a station this side and waited for a south-bound train to Liberty, and that she consented to this.

In this conflict of evidence the jury found upon the issues submitted to them: "(1) Did the defendant wrongfully refuse to stop its train at Liberty and permit the plaintiff to depart therefrom? Yes. (2) Did the defendant maliciously or willfully, wantonly, and rudely mistreat and humiliate the plaintiff while a passenger on its train? Yes." The latter was a pure issue of fact, and the finding of the jury is conclusive; the judge having refused to set the verdict aside. As to the first issue, it is a reasonable regulation of the defendant that certain trains shall not stop at all stations, provided there are enough to serve

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the purposes of local travel, and it does not appear that there was not. If the plaintiff had been aware that this train did not stop at Liberty, she could not complain if she had been put off at Gastonia, the first stop, with her ticket indorsed with leave to pursue her journey by the next train stopping at Liberty. But she testifies that she had no such information; on the contrary, that she had twice in 18 months previously been on the same train, which stopped and put her off at Liberty. The notice on the printed schedule of the company was not brought home to her, and there was no evidence that she had any actual notice. There was nothing on the face of her ticket to show that it was not good on that train. It was the duty of the defendant to have had an agent at the gate (as is usual) to examine the tickets and allow no one to get upon a train which does not stop at his destination. Not having done this, but having received the plaintiff into this train without objection, with a ticket calling for Liberty, a regular station, as her destination, and she not knowing that this train did not stop there, it was the duty of the defendant to stop the train at that point for her.

On the question of damages his honor correctly instructed the jury that if the conductor maliciously or with wanton recklessness carried her by her station, or if he maliciously or wantonly mistreated and humiliated her, the jury could assess punitive damages. The authorities are plenary that the passenger is entitled to recover punitive damages for insult or mistreatment on the part of any employee of the common carrier. *Williams v. Gill*, 122 N. C. 970, 29 S. E. 879; *Strother v. Railroad*, 123 N. C. 197, 31 S. E. 386; and many other cases. It is equally true that Code, § 1963, provides that passengers shall be put off at the destination to which they have paid, and that the carrier "shall be liable to the party aggrieved in an action for damages for any neglect or refusal in the premises," and that when the refusal to take on or discharge a passenger, where he is entitled to be received or discharged, is reckless and wanton, punitive damages may be recovered. *Purcell v. Railroad*, 108 N. C. 417, 12 S. E. 954, 956, 12 L. R. A. 113; *Hansley v. Railroad*, 117 N. C. 570, 23 S. E. 443, 32 L. R. A. 543, 53 Am. St. Rep. 600; *Coleman v. Railroad*, 138 N. C. 355, 50 S. E. 690. Certainly the plaintiff, an unprotected female, was entitled to recover, if recklessly and willfully carried against her protest 25 miles beyond her station, put out at 2:30 at night at a strange station, where she sits at dead of night two hours alone on the platform, and at last reaches her destination before day, to be met by no one, and has to walk to her daughter's house alone, and with shattered nerves has to take her bed and call in a physician. *Holmes v. Railroad*, 94 N. C. 323; *Knowles v. Railroad*, 102 N. C. 66, 9 S. E. 7. The authorities are uniform, here and elsewhere, that, if the passenger is carried by his station, he is entitled to damages, and if it is done recklessly or willfully, as the jury

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here find, he is entitled to punitive damages. The only decision we can find in the books to the contrary is *Smith v. Railroad*, 130 N. C. 304, 41 S. E. 481, which holds that, if there is no bodily harm or actual damages, a recovery cannot be had. That decision was by a divided court, and is in conflict with the statute (Code, § 1963) above quoted, and unsupported by precedent, and we take this first opportunity to correct and overrule it. In *Thompson on Carriers*, 66, it is said: "Carrying a passenger beyond his destination, in disregard of his request to be put off there, will afford a good ground of action; and this, though no bodily harm, mental suffering, insult or oppression, or pecuniary loss be shown"—citing *Railroad v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785; *Porter v. The New England*, 17 Mo. 290; *Railroad v. Nuzum*, 50 Ind. 141, 19 Am. Rep. 703; *Railroad v. McArthur*, 43 Miss. 180; *Railroad v. Whitfield*, 44 Miss. 466, 7 Am. Rep. 699; *Sunday v. Gordon*, 1 Blatchf. & H. 569, Fed. Cas. No. 13,616; *Thompson v. Railroad*, 50 Miss. 315, 19 Am. Rep. 12. To the same purport, 1 Fetter, *Carriers of Pass.*, § 300, citing *Caldwell v. Railroad*, 89 Ga. 550, 15 S. E. 678; *Dave v. Steamboat Co.*, 47 La. Ann. 576, 17 South. 128; *Strange v. Railroad*, 61 Mo. App. 586; and there are many other cases to the same effect.

Upon examination of all the exceptions, and without discussing them seriatim, we find no error.

HAYES v. ADAMS EXPRESS CO.

(Supreme Court of New Jersey, Nov. 16, 1905.)

[62 Atl. Rep. 284.]

Carriers—Loss of Freight—Damages—Limitation.*—On delivering to a common carrier a drop curtain of ordinary character and value, the shipper received as a voucher therefor an instrument in which it was stated that, when the shipper omits to declare the value of the goods, he agrees that the value does not exceed \$50. Held, that the responsibility of the carrier for the real value in case of loss was not thereby restricted, unless the shipper had knowledge of the stipulation; and his knowledge that the carrier's charges depend on the value of the goods is not sufficient to render the limit of liability obligatory.

(Syllabus by the Court.)

*For the authorities in this series on the question whether the shipper's acceptance of a contract of shipment includes his assent to its terms, see foot-notes appended to *Arthur v. Texas & P. Ry. Co.* (C. C. A.), 17 R. R. R. 17, 40 Am. & Eng. R. Cas., N. S., 17; see foot-note appended to *Patrick v. Missouri, etc., Ry. Co.* (Ind. Terr. App.), 16 R. R. R. 554, 39 Am. & Eng. R. Cas., N. S., 554; *Gila Valley, etc., Ry. Co. v. Lyon* (Ariz.), 16 R. R. R. 745, 39 Am. & Eng. R. Cas., N. S., 745.

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Appeal from District Court of Elizabeth.

Action by Norman S. Hayes against the Adams Express Company. Judgment for defendant; and plaintiff appeals. Reversed.

Argued June term, 1905, before SWAYZE and DIXON, JJ.

P. H. Gilhooly, for appellant.

Conover English and *R. H. McCarter*, for respondent.

DIXON, J. On April 2, 1904, the plaintiff's employee delivered to the defendant's agent in Elizabeth a drop curtain consigned to Syracuse, and received from the agent a document on which were written the names of the shipper and consignee, and a description of the article shipped. The document also contained in print many terms and conditions, to which, it declared, the shipper agreed, and among them one to the effect that, if no value of the goods was declared the value did not exceed \$50. Nothing was then said by either the employee or the agent about the value of the curtain, or the contents or nature of the document. The curtain should have reached Syracuse within three days, but no tidings of its whereabouts since shipment appear. In an action brought in the Elizabeth district court to recover compensation for its loss, the plaintiff produced evidence tending to show that the curtain was worth \$300, and the defendant relied on the terms of the document to bar a recovery for more than \$50. On this issue the judge instructed the jury that the only point was whether the plaintiff knew that the defendant's rates depended on the value of the goods. If he did, the verdict in his favor should be for \$50 only; but, if he had no reason to know that the rates depended on value, then the verdict should be for \$300. On this charge the jury awarded the plaintiff \$50, and he now appeals to this court.

At common law, of course, the defendant, being a common carrier, would be responsible for the actual value. The weight of authority in this country is to the effect that, in order to lessen the responsibility of a common carrier, it must appear that the shipper assented to the restriction, and that in general a declaration of limited liability, made by the carrier in a public advertisement or in a receipt handed to the shipper, will not suffice to bind the latter to the limitation so declared. We approve of the views on this subject expressed by Mr. Justice Nelson in *New Jersey Steam Navigation Co. v. Merchants' Bank*, 6 How. 344, 382, 12 L. Ed. 465, and by Mr. Justice Davis in *Railroad Co. v. Manufacturing Co.*, 16 Wall, 318, 328, 21 L. Ed. 297. It has, however, sometimes been held that an exception to this general rule should exist in regard to the value of the goods shipped; that, because of the comparatively slight means of knowledge as to value possessed by the carrier, the shipper should assume that the carrier has fixed a

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limit to his liability on this point, unless he is expressly charged with a specified liability; and on this assumption the shipper assents to the limitation in all cases where his dissent is not shown. Such a doctrine is said to be necessary to secure fair dealing. But it is undoubtedly a departure from the rule of the common law, and in both of the Constitutions adopted in this state it was declared that the common law should remain in force until altered by the Legislature. This part of the common law, which relates to the responsibility of the carrier, has always been regarded by our courts as embraced in our system of jurisprudence. Thus, in *Pennsylvania R. R. Co. v. New Jersey R. R. & T. Co.*, 27 N. J. Law, 100, this court adjudged that, "where a common carrier undertakes to transport an article in the line of his business, the legal presumption is that he does it subject to his common-law liability, and this presumption remains until it is overcome by positive proof of a special agreement." We are unable to see on what principle this feature of the common law can be abrogated by the judiciary. Where unfair dealing actually appears, the courts may, in harmony with the law, afford an appropriate remedy, but for other cases the suggestion that the law might be improved calls for the intervention of the Legislature alone. The circumstances of the case now in hand disclose no unfair dealing. The nature of the article shipped was known to the carrier, and its value does not appear to have been abnormal. The shipper, therefore, had the right to assume, in the absence of notice to the contrary, that the carrier would form his own judgment as to its value, so far as was necessary for the fixing of his compensation, without attempting to restrict his responsibility under the general law. There was evidence from which the jury might have inferred that the plaintiff knew and assented to the defendant's limitation of value; and, if the matter had been submitted to the jury on that question, a determination against the plaintiff would have been legal. But the question presented by the judge was quite different. It required the jury to find merely knowledge on the part of the plaintiff that the defendant's charges depended on the value of the goods shipped. Every person who thinks intelligently must know so much, for, of course, as the carrier's responsibility varies with the value, so should his compensation. But such knowledge in a shipper by no means justifies an inference that, if he does not declare the value of the goods, he assents to a limitation of value fixed by the carrier.

The exceptions taken by the plaintiff at the trial properly present for review this portion of the charge, and therefore the judgment should be reversed, and the cause remitted to the district court for a new trial.

INTERNATIONAL & G. N. R. CO. *v.* EDWARDS.

(Supreme Court of Texas, May 9, 1906.)

[93 S. W. Rep. 106.]

Railroads—Crossing Accident—Contributory Negligence.*—Plaintiff could not recover for injuries sustained in a crossing accident, where the approach of the train was plainly visible and audible, and he walked on the track without paying any attention to it, merely because the statutory signals were not given by the train operative.

Error from Court of Civil Appeals of Third Supreme Judicial District.

Action by Will Edwards against the International & Great Northern Railroad Company. From a judgment of the Court of Civil Appeals (91 S. W. 640), affirming a judgment in favor of plaintiff, defendant brings error. Reversed, and judgment rendered for defendant.

Baker & Thomas and *N. A. Stedman*, for plaintiff in error.

S. E. Stratton and *J. E. Yantis*, for defendant in error.

WILLIAMS, J. The judgment before us was recovered by defendant in error, who was plaintiff below, on account of personal injuries sustained by him from being struck by the engine of a passing train of plaintiff in error, near Waco, at the crossing of a public country road over the railroad. The evidence, without contradiction, shows that the plaintiff walked along the road at night, approaching the railroad obliquely with his side towards it, until he came near the crossing when he turned with the road across the track, and was struck as he reached the center thereof. The train was visible by its electric headlight upon a straight track for a mile or more before it reached the crossing and the noise of its motion was plainly audible. Plaintiff admits that, before stepping on the track, he neither looked, nor listened for the train, although he was familiar with the crossing, and knew of the frequent passing of trains; and that he could have seen and heard it, had he done so. All of the other evidence is to the same effect. He relies alone upon the fact, which the evidence is sufficient to prove, that the whistle was not blown nor the bell rung as required by the statute, claiming that he was listening for those signals, and, because he did not hear them, did not look for the train nor pay attention to the noise it made.

The law is well settled that a traveler approaching a railroad crossing must exercise ordinary prudence in going upon the

*For the authorities in this series on the subject of combined effect of contributory negligence and failure to give crossing signals, see foot-notes appended to *Green v. Missouri Pac. Ry. Co.* (Mo.), 18 R. R. R. 793, 41 Am. & Eng. R. Cas., N. S., 793; foot-notes appended to *Brammer's Adm'r v. Norfolk & W. Ry. Co.* (Va.), 18 R. R. R. 497, 41 Am. & Eng. R. Cas., N. S., 497.

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track to see that he may do so with safety. He cannot excuse the absence of all care by showing that those in charge of a train have also been guilty of negligence. This is the precise attitude of the plaintiff, when he claims that he was not bound to look out for himself until the statutory signals were given. His claim cannot be admitted without denying the rule which exacted the duty of due care on his part, a duty as binding on him as was the duty of giving signals binding on the defendant. The case is easily distinguished from those in which this court has held that, under the facts thereof, it would have been improper for the courts to have instructed that it was the duty of the travelers to do any particular thing as a measure of due care, such as to look and listen, it being the function of the jury to say what precautions were called for by the particular situation. Those cases presented issues for the jury to determine as to whether or not the care taken was sufficient, and not bare facts, like those in this case, establishing that no care whatever was taken and offering no excuse for its absence except a reliance on the other party. In one of those cases this court took occasion to say with reference to charging the jury: "The rule given as to degree of care required of deceased is recognized by former decisions of this court. *Houston & G. N. R. Co. v. Randall*, 50 Tex. 254; *Houston & T. C. Ry. Co. v. Cowser*, 57 Tex. 302; *Houston & T. C. Ry. Co. v. Waller*, 56 Tex. 334; *Texas & P. Ry. Co. v. Murphy*, 46 Tex. 356, 26 Am. Rep. 272; *Eames v. Texas, & N. O. Ry. Co.*, 63 Tex. 660. Having given the proper rule to the jury, the judge had performed his duty unless, from the whole case as made by the testimony, the plaintiff had no testimony upon which the jury could reasonably have found a verdict in her favor; in which state of facts the court could have refused to submit the case to the jury. The plaintiff's case would fail from absence of testimony to any negligence on part of defendant, or upon absence of any testimony from which a jury could find due care or its equivalent, because of negligence on part of deceased." [*Mo. Pac. Ry. Co. v. Lee*, 70 Tex. 501, 7 S. W. 857.]

While persons using a railway crossing have the right to expect that the law requiring signals will be obeyed, this is not a substitute for the duty of exercising care for themselves and they are not excused from that duty by the fault of the other party. No case in this court has allowed a recovery upon facts such as these and the judgment cannot be permitted to stand without abolishing the rule, recognized by all authority, requiring the exercise of ordinary prudence on the part of persons crossing railroad tracks.

The judgment will be reversed, and, as the admitted facts show that plaintiff is not entitled to recover, judgment will be here rendered for the defendant.

Reversed and rendered.

TAGGART v. REPUBLIC IRON & STEEL CO.

(Circuit Court of Appeals, Sixth Circuit, November 13, 1905.)

[141 Fed. Rep. 910.]

Railroads—Ohio Statute Requiring Blocking of Frogs—Private Switches.*—A manufacturing company, maintaining in its yards a number of tracks and a switch engine for its use in shifting freight cars, is not a "railroad corporation operating a railroad or part of a railroad," within the meaning of 93 Ohio Laws, p. 342, requiring such railroad corporations to block their frogs.

Master and Servant—Action for Injury to Switchman—Questions for Jury.†—Plaintiff was employed as a switchman in the yards of defendant, a manufacturing company, and in stepping between slowly moving cars to uncouple the same, after the automatic couples failed to work, his foot caught in an unblocked frog, and he was injured. There was testimony that the couplers on a large number of cars switched in the yards would not work, and that it was customary in such case, and in fact often necessary, for the switchman to go between the cars; and there was no rule prohibiting it. Plaintiff had worked there but 12 days, and testified, without contradiction, that he did not know the frogs were unblocked, because they were covered with cinders. Held, that the question whether plaintiff was negligent in attempting to make the coupling as he did, and also the question whether, if so, his negligence was a proximate cause of his injury by reason of the unblocked frog, were questions for the jury.

In Error to the Circuit Court of the United States for the Northern District of Ohio.

King & Tracy and *Marshall & Fraser*, for plaintiff in error.

Richard Jones, Jr., and *Holbrook & Monsarrat*, for defendant in error.

Before LURTON, SEVERENS, and RICHARDS, Circuit Judges.

RICHARDS, Circuit Judge. This was a suit to recover damages for personal injuries (the loss of a foot) suffered by the plaintiff while in the employ of the defendant as a yard switchman. The court directed a verdict against the plaintiff, on the ground that the testimony showed he was guilty of contributory negligence. The case is here upon the question whether it was one for the jury.

*For the authorities in this series on the questions, what is railroad work and what constitutes operating a railroad, see foot-note appended to *Mace v. Boedker & Co.* (Iowa.), 17 R. R. R. 301, 40 Am. & Eng. R. Cas., N. S., 301; foot-note appended to *Swartz v. Great Northern Ry. Co.* (Minn.), 15 R. R. R. 790, 38 Am. & Eng. R. Cas., N. S., 790.

†For the authorities in this series on the subjects of contributory negligence of and assumption of risks by car-couplers, see foot-notes appended to *St. Louis S. W. Ry. Co. v. Pope* (Tex.), 16 R. R. R. 736, 39 Am. & Eng. R. Cas., N. S., 736; foot-notes appended to *Southern Pac. Co. v. Gloyd* (C. C. A.), 16 R. R. R. 408, 39 Am. & Eng. R. Cas., N. S., 408; foot-notes appended to *Taylor v. Boston & M. R. R.* (Mass.), 16 R. R. R. 397, 39 Am. & Eng. R. Cas., N. S., 397; foot-notes appended to *Moore v. St. Louis, etc., Ry. Co.* (La.), 16 R. R. R. 370, 39 Am. & Eng. R. Cas., N. S., 370.

Taggart v. Republic Iron & Steel Co

The accident took place on August 8, 1903. Taggart, the plaintiff, was then 35 years old, and had been employed by the steel company about 12 days. Before that time, he had been employed some 3 years as a brakeman in yard and road service. The company owns and operates a rolling mill near Toledo, Ohio, and in connection with it a number of tracks and switches in the yard which incloses its plant. On these tracks it operates a pony or switch engine for convenience in shifting freight cars. For this purpose it employs an engineer and a switchman. On the day of the accident, the plaintiff and the engineer were engaged in switching cars in the yard. Three box cars were attached to the engine. It was necessary for the plaintiff to cut off two of these cars by uncoupling them. The cars were moving at the rate of from two to four miles an hour. The cars to be uncoupled were each provided with an automatic coupler. The plaintiff was on the west side of the train, the same side as the engineer. There was testimony tending to show it was necessary for him to be here, because only from this side could he signal the engineer, and because a sand bin and other obstructions came so close to the track on the other side as to prevent an approach to the cars there. Walking along as the train moved, the plaintiff two or three times attempted to uncouple the cars by the use of the lever of the automatic coupler, but it would not work. He says the chain was so long it would not lift the pin. At any rate, failing to uncouple the cars by the use of the automatic coupler, he stepped between them for the purpose of lifting the pin with his hand. As he stepped in, his foot was caught in an unblocked frog and crushed and mangled by the moving car before he could extricate it. The testimony was conflicting as to whether the cars could have been safely uncoupled while standing still. The engineer, who had had no experience as a switchman, thought they could. The plaintiff and other switchmen said they could not. The court took the view that, since the cars were equipped with automatic couplers, the switchman was bound to uncouple them without going between them, and, if there were obstructions on the other side, he should have signaled the engineer to move the cars further up, and then have gone around and tried the coupler on the other side. Since he did not do this, but took "the more dangerous way," he was guilty of contributory negligence. Respecting the testimony of the plaintiff that it was the custom in that yard to uncouple by hand while the cars were in motion when the automatic coupler would not work, the court said that no custom of that sort could change the inherent negligent character of the act of unnecessarily going between the cars when they were moving.

1. Counsel discussed the question whether the Ohio statute requiring railroad companies to block their frogs did, or did not, apply to the defendant. The act in terms applies to "every

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railroad corporation operating a railroad or part of a railroad in this state." 93 Ohio Laws, p. 342. Failure to comply with the act subjects the railroad corporation to a punishment by fine. Although, by the law of Ohio, a manufacturing company may construct a railroad, when such purpose is stated in its articles of incorporation (Rev. St. § 3866), and with respect to it is made subject to the general railroad laws of the state, we are not satisfied that the yard tracks and switches, operated by the defendant in the manner we have described, come within the intent and meaning of this statute. *U. S. v. Harris*, 177 U. S. 305, 20 Sup. Ct. 609, 44 L. Ed. 780. They do not seem to us to constitute a railroad or make this manufacturing company a railroad corporation under the law of Ohio. We might as well hold that every private switch constitutes a railroad and makes the person or company owning and operating it a railroad corporation. These yard tracks are nothing more than private switches and were only used as such. There were some 10 frogs in this yard, all unblocked, and covered with cinder, so their character was not open and obvious. The failure to block them, if not negligence as a matter of law under the Ohio statute, might have been held by the jury to be negligence in fact under all the circumstances.

2. The real question in the case, as submitted to us, is whether the court was correct in holding that the plaintiff had been guilty of contributory negligence in stepping between the cars. We think the court was not; that the rule laid down in the case of *L. E. & W. R. R. Co. v. Craig*, 73 Fed. 643, 19 C. C. A. 631, and *Id.*, 80 Fed. 488, 25 C. C. A. 585, required the submission of the question to the jury. Taggart had been employed in the yard only 10 or 12 days. He was not informed that the frogs were unblocked. He says he did not know they were unblocked, that the cover of cinder concealed their character, and there was nothing to contradict him, except an inference—the inference that because he was working there he must have noticed their character. In answer to this, it might be said that, having worked where the frogs were required by law to be blocked, he would naturally presume, without examination, that these frogs were blocked. The company had no rules to regulate his work. In the *Craig Case* there was a rule forbidding employees to go between the cars when coupling or uncoupling, but the plaintiff was permitted to show that the company practically abrogated or abandoned the rule by acquiescing in its constant violation. In the present case there was no rule, and there was testimony tending to show that it was usual and customary for the switchman to step in and lift the pin when the automatic coupler would not work, although the cars were in motion. The yard boss testified to this. There was also testimony of a substantial kind, tending to show it was not only customary, but, as a practical thing, necessary and proper, for the plaintiff, under the peculiar circumstances pre-

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sented to him, to step in for the purpose of lifting the pin; that he had to work on that side, both to signal the engineer and because there were obstructions on the other; and he had to uncouple the cars while moving because they could not be uncoupled when standing still without reasonable difficulty and delay, if not danger. To the suggestion that the presence of the automatic couplers changed the situation, it may be said that such a coupler to be effective must work. The uncontradicted testimony was that this coupler would not work and there was testimony to the effect that 80 per cent. of the couplers tried in the yard would not work. It may have been that the cars used there did not come under the federal act. That act, as we have held, is limited to cars used in interstate commerce. *U. S. v. Geddes*, 131 Fed. 452, 65 C. C. A. 320. But, however that may be, a car with an automatic coupler that will not work is to all intents and purposes a car without an automatic coupler, and the switchman must handle it in the old way, dangerous though that may be.

This brings us to another consideration, whether, if Taggart was negligent in stepping in to lift the pin, such negligence contributed directly to his injury; in other words, whether he should have anticipated the accident which befell him. Ought he to have foreseen the unblocked frog? The record does not show that the cars were moving at a speed dangerous in itself. If Taggart, in stepping in, had stumbled and had been run over, or in lifting the pin had caught his hand and had it crushed, it might well be said that these were contingencies he should have anticipated, and that his negligence in exposing himself to such dangers was the proximate cause of his injury; but there was testimony tending to show that he had no reason whatever to apprehend the danger of the unblocked frog. That was a danger to which he would have equally exposed himself in walking ahead of a moving train or in going around it to get to the other side. Both these things switchmen frequently have to do. In the *Craig Case* it was held that this question of proximate cause was one for the jury. 73 Fed. 642, 646, 19 C. C. A. 631.

Being of the opinion that the case was one for the jury, the judgment is reversed, and the case remanded for a new trial.

BERG v. ST. PAUL CITY RY. CO.

(Supreme Court of Minnesota, Dec. 29, 1905.)

[105 N. W. Rep. 191.]

Carriers—Injury to Passenger—Assault by Employees.*—An action to recover damages for an assault alleged to have been committed upon the plaintiff by the defendant's employees, who were in charge of a car on which he was a passenger. Held, where the act of a defendant, which is the subject-matter of the action, is shown to have been wanton, or malicious, or fraudulent, or oppressive, and of such a character as to indicate that he acted with a reckless disregard of the rights of the plaintiff, the jury in their discretion may award to the plaintiff, in addition to his compensatory damages, such further reasonable sum as exemplary damages as they may deem just; but the plaintiff is not entitled to such damages as a matter of legal right in any case.

Same—Exemplary Damages.—The evidence herein does not show a case for exemplary damages.

(Syllabus by the Court.)

Appeal from District Court, Ramsey County; Grier M. Orr, Judge.

Action by Robert D. Berg against the St. Paul City Railway Company. Verdict for plaintiff. From an order denying a new trial, defendant appeals. Reversed.

Munn & Thygeson, for appellant.

Albert Schaller and Otto Kueffner, for respondent.

START, C. J. On December 16, 1904, the plaintiff was a passenger on one of the street cars of the defendant. A controversy arose between him and the conductor of the car as to whether he had paid his fare, and this action was brought to recover damages for an alleged assault upon the plaintiff by the employees of the defendant as a result of such controversy. A trial of the cause resulted in a verdict for the plaintiff for the sum of \$550. The defendant appealed from an order denying its motion for a new trial.

It is here contended on behalf of the defendant that the trial court erred in submitting the question of exemplary damages to the jury, for the reason that the evidence was not sufficient to establish a case for the allowance of exemplary or punitive damages, because "there was no wantonness or willfulness in the conduct of the trainmen which would authorize the assess-

*For the authorities in this series on the question whether or not exemplary or punitive damages may be recovered for wrongs to passengers, see foot-notes appended to *Peterson v. Middlesex & Somerset Traction Ry.* (N. J.), 15 R. R. R. 672, 38 Am. & Eng. R. Cas., N. S., 672; *Dagnall v. Southern Ry. Co.* (S. Car.), 15 R. R. R. 59, 38 Am. & Eng. R. Cas., N. S., 59; *Southern Ry. Co. v. Lanning* (Miss.), 15 R. R. R. 1, 38 Am. & Eng. R. Cas., N. S., 1; foot-notes appended to *Pickett v. Southern Ry. Co.* (S. Car.), 14 R. R. R. 269, 37 Am. & Eng. R. Cas., N. S., 269; *Yazoo & M. V. R. Co. v. Mattingly* (Miss.), 14 R. R. R. 48, 37 Am. & Eng. R. Cas., N. S., 48.

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ment of punitive damages," and, further, that the instruction as given was erroneous in any event. The trial court submitted the question of exemplary damages to the jury in these words: "In the event that you should find that the plaintiff was a passenger for hire, and, notwithstanding that his transportation had been paid for and that the conductor of the car, knowingly understanding the fact that he had paid such fare, then and in that event committed an assault, in the line of his duty, upon the plaintiff, the company in that event would be liable for punitive or exemplary damages, for all those damages which are in addition to the other damages which followed and flowed naturally as the proximate result; but it is only in these exceptional cases where it appears that it is wantonly and maliciously done." Even if the evidence warranted the submission of the question to the jury, this instruction was technically inaccurate; for while the trial judge did not say to the jury that if they found the facts as stated the plaintiff would be entitled to exemplary damages, yet he did say that the defendant would be liable for such damages, omitting the qualification, "in the discretion of the jury." The correct rule is that where the defendant's act which is the subject-matter of the action is shown to have been wanton, or malicious, or fraudulent, or oppressive, and of such a character as to indicate that he acted with a reckless disregard of the rights of the plaintiff, the jury in their discretion may award to the plaintiff, in addition to his compensatory damages, such further reasonable sum as exemplary damages as they deem just; but the plaintiff is not entitled to such damages as a matter of legal right in any case. *Lynd v. Picket*, 7 Minn. 184 (Gil. 128), 82 Am. Dec. 79; *Gardner v. Minea*, 47 Minn. 295, 50 N. W. 199; 1 *Joyce on Damages*, § 118.

The contention of the plaintiff that the attention of the trial court should have been called to the fact that the instruction was too broad, hence misleading, we do not consider; for we are of the opinion that the first objection to the instruction made by the defendant is valid. The verdict of the jury establishes the fact that the plaintiff had paid his fare, and therefore the conductor had no right to eject him from the car; but it does not necessarily follow from this that the conductor, "knowingly understanding" that the fare had been paid, wantonly or maliciously and in disregard of the plaintiff's rights attempted to eject him from the car. His conduct must be adjudged by the facts as he understood them at the time the controversy arose. He may have been mistaken; but such fact alone is not sufficient to justify exemplary damages. The plaintiff's own testimony indicates quite clearly that the conductor honestly believed that the fare had not been paid and that it was his duty to eject him. The plaintiff's version of the affair was this: "I got on the car, as usual, at Gibbs avenue and Langford, at 7 o'clock, or near about, and stood on the back platform smok-

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ing. It was a warm morning; and as I got on the conductor opened the door and collected my fare. Then he went up to the front end of the car and started collecting fares, and came back and handed out his hand again for another fare. I informed him that I had paid my fare, and he said to the contrary, that I hadn't, and was going to put me off the car. So when we got to Hamline avenue he stopped the car and was going to put me off. I refused to get off, and he caught me around the neck and was going to shove me off the car, through the gates, and I held on to the rail there, and he kept pushing, and I struck him, and he rang the bell, I think, and the motorman came back to the platform, and grabbed me around the neck, and was going to put me off. And just then a man from inside the car spoke up in my defense." On his cross-examination he testified as follows: "Q. You say you did strike the conductor? A. I did. Q. You gave him a good swipe, too, didn't you? A. Well, I was being pushed off the car. Q. Answer that question. Did you give him a good swipe? A. I struck him in the face. Q. So that he bled profusely. A. I don't know how hard he bled. Q. Well, he bled, didn't he? A. I think so. Q. You saw the blood run down from his nose, over his mustache, and down his clothes. A. I think the blood run from his nose. Q. And you swiped him again, didn't you? A. I believe I hit him more than once. Q. You hit him three or four times, didn't you? A. I might have." He also testified that he told the conductor he had paid his fare and was going to stay on the car and ride down town; that he was roughly handled and struck by the motorman when he came to the assistance of the conductor, and that he struck the motorman; that further hostilities ceased upon the protest of the passengers, and the plaintiff stayed on the car and rode to his destination. The conductor testified that the plaintiff did not pay his fare, and was requested several times to do so, and told that he must get off at Hamline unless he paid his fare; that he refused to do either, and when the car stopped at Hamline he took the plaintiff by the arm and told him he must pay or get off, and pushed him towards the gates; then the plaintiff struck him.

We are of the opinion, upon the plaintiff's own testimony, accepting it as true, as we must for the purpose of this appeal, that a case was not made for the imposition of punitive damages. It follows that the instruction of the trial court was prejudicial error, for which a new trial must be granted.

Order reversed, and new trial granted.

NORFOLK & W. RY. CO. *v.* HARMAN.

(Supreme Court of Appeals of Virginia, Nov. 23, 1905.)

[52 S. E. Rep. 368.]

Carriers—Bills of Lading—Construction.—A bill of lading, made out on a form used for the transportation of live stock, was issued to cover a shipment of live stock and also of household goods. One clause of the bill required the shipper to give notice of his claim as a condition precedent to his right to recover "for loss or injury to said animals." Held, that the shipper was not required to give notice of a claim for injury to his household goods before suing for damages on account of such injury.

Trial—Instructions—Disregard of Evidence.—In an action against a carrier for injuries to goods in transit, a charge that the bill of lading constitutes the contract between the parties and that the jury must disregard parol evidence in conflict therewith was properly refused, as leaving the jury to review the rulings of the court in admitting testimony and to decide for themselves whether any evidence conflicted with the bill of lading, whereas no evidence was admitted to which defendant excepted as inadmissible.

Carriers—Bills of Lading—Construction.—A bill of lading having on it the characters "Rel. Val. Lts. [or Ltd.] 5 cwt." will not, in the absence of evidence on the subject, be construed as an agreement limiting the value of the property covered by the bill to five dollars per hundred pounds, especially in view of another clause of the bill of lading placing a different and higher valuation upon certain of the property.

Appeal—Harmless Error—Modification of Instructions.—In an action against a carrier for injury to property in transit, defendant requested the court to charge that the jury must, under the bill of lading, estimate the damage on the basis of five dollars per hundred pounds weight. The court gave the charge, subject to the modification, "provided the jury believes the bill of lading was a special contract," etc. There was in fact nothing on the bill of lading which the court could as a matter of law declare to constitute a contract fixing the value of the goods at five dollars per hundred pounds. Held, that the modification of the charge was not prejudicial to defendant.

Error to Circuit Court, Botetourt County.

Action by O. E. Harman against the Norfolk & Western Railway Company. There was a judgment in favor of plaintiff, and defendant brings error. Affirmed.

E. M. Pendleton and *M. McCormick*, for plaintiff in error.
Benj. Haden, for defendant in error.

CARDWELL, J. O. C. Harman, the plaintiff in this cause, was a farmer, and had resided with his family at Ewing, in Lee county, Va., until the early part of November, 1904, when determining to return to Botetourt county, where he had lived formerly, he loaded in a box freight car his household goods, family supplies, wagons, utensils, and animals (two mules, one horse, and a cow and calf), and accepted and signed a bill of lading from the Louisville & Nashville Railroad Company for the transportation of said articles by that company from

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Ewing, Va., to the terminus of that company's line at Norton, Va., there to be delivered to the Norfolk & Western Railroad Company for transportation to Cloverdale, Va., this being a station of the Norfolk & Western Railway Company in Botetourt county nearest to the new home to which Harman was moving.

The car was duly transported without special incident by the Louisville & Nashville Railroad Company, and delivered at Norton to the Norfolk & Western Railway Company, and from thence by the latter company was duly transported to Roanoke, Va., arriving at the latter point on the night of November 12, 1904; Harman and his young son traveling in the same train, and generally in the same car. While upon the yards of the Norfolk & Western Railway Company at Roanoke, and being shifted onto the line of that company, over which the car was to be transported to Cloverdale, the car was so roughly handled as to cause serious damage to the two mules, the family supplies, household goods, etc.; and to recover for this injury Harman brought this suit against the Norfolk & Western Railway Company.

There was a verdict and judgment in favor of the plaintiff for \$500, with interest thereon from June 8, 1905, till paid, to which a writ of error was awarded by one of the judges of this court.

The first error assigned is that the trial court erred in refusing to give to the jury the following instruction, asked by plaintiff in error, viz.:

"The court instructs the jury that a bill of lading is a contract between the shipper on the one part and the carrier on the other, and they must be controlled in their verdict by it; and if the jury believe from the evidence that the plaintiff did not give notice to defendant's agent at Cloverdale, as required by the twelfth clause of the bill of lading, then the jury must find for the defendant."

The twelfth clause of the bill of lading is as follows:

"As a condition precedent to the shipper's right to recover damages for loss or injury to said animals, he will give notice in writing of his claim thereof to the agent of the railroad company or other carrier from whom he receives said animals before said animals are removed from the place of destination above mentioned, or from the place of delivery of the same to said shipper, and before said animals are mingled with other animals."

This bill of lading is of the class used by the initial carrier "for the transportation of live stock over its lines," while opposite the name of "consignee, destination," etc., and under the heading, "Description of Stock," besides "3 Head Horse," "2 Do. Cattle," there also appear "H. H. Goods." "Rel. Val. Lts., 5 cwt." Clearly, as is readily to be observed, clause 12 of the bill of lading could not have had and was never intended to have, application to suits to recover damages for loss or injury to property

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other than "animals." In fact, it was nowhere claimed in the conduct of the case before the jury that this cause of the bill of lading had any such application. Defendant in error sued to recover for injuries, not only to his two mules, but to family supplies, household goods, furniture, etc., contained in the same car and set out in the bill of particulars filed with his declaration, amounting to \$726.55, of which amount \$300 was claimed for injuries to the mules; yet the trial court was asked to instruct the jury that he could not recover for the damages done to his household goods and other property unless he gave written notice to the agent at Cloverdale about the injury to his mules. If the full force and effect, as claimed by plaintiff in error, be given the bill of lading, it would not have justified the giving of this instruction, inasmuch as it could have no application to anything contained therein other than the "animals." For this all-sufficient reason, the instruction was rightly refused.

After the court had passed upon the instructions asked for by both parties, and after the argument had been partly made, it was asked by plaintiff in error to give the following instructions:

"B. The jury is instructed that the bill of lading introduced in evidence in this case, in all of its parts, constitutes the contract between the parties, and no parol evidence is admissible to vary its terms. If such parol evidence has been before the jury, which is in conflict with this contract, the jury must disregard it.

"C. If the jury believe from the evidence that the plaintiff is entitled to recover in this action, then in assessing such damages against the defendant the jury must estimate the damages on the supposition that the plaintiff's goods, live stock, etc., were only worth \$5 for every hundred pounds of weight they weighed, and the burden of proof of their weight is on the plaintiff. In no event can the jury find, on account of damages to the mules, more than \$5 per hundred of their weight; the court telling the jury in this case that the measure of the railway company's liability is to be determined by the weight of the articles loaded in the car."

Instruction B directed the jury to disregard any parol evidence which the jury might decide to be in conflict with the bill of lading. It did not tell the jury that any evidence had been admitted which was in conflict with the bill of lading, and which they should disregard, but left them to review the rulings of the court in admitting testimony, and to decide for themselves whether any evidence introduced did conflict with the bill of lading, what that evidence was, and to disregard it, when in point of fact the record discloses that no evidence was admitted by the court to which plaintiff in error excepted as inadmissible. It has been said again and again by this court that it is the duty of the court, and not the jury, to pass upon the effect of written instruments. *City of Richmond v. Gallego Mills*, 102 Va. 165. 45 S. E. 877, and authorities cited. It is also too well settled to

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admit of citation of authority that the admissibility of testimony is for the court, and not for the jury.

It was sought by instruction C to announce to the jury as the court's interpretation of the bill of lading, in the light of the evidence, that the measure of the plaintiff's damage was \$5 for every hundred pounds that his property—his goods and live stock—weighed, when there is nothing whatever in the evidence of any agreement between the parties that the value of the plaintiff's property was only \$5 for every one hundred pounds of weight, or was to be limited to that valuation in case of injury thereto by reason of the negligence of the carrier, unless it be that the characters, "Rel. Val. Lts. [or Ltd.] 5 cwt.," appearing on the bill of lading as before stated, meant that the plaintiff and the defendant had agreed that the property should be considered as worth only \$5 for every hundred pounds of weight.

There is certainly no evidence in the record as to what the characters stood for, or that they had any meaning at all. We have taken occasion to examine the original bill of lading, and find that the characters in question are not only badly written, but have no such connection with the intelligible portions of the paper as would throw any light upon them as showing their meaning, and therefore it cannot be said that their meaning was discernible to a person of ordinary intelligence. There is no dollar mark in front of the figure 5. Its use would be meaningless, certainly to a person even of a high order of intelligence, in the hurry usual in the issuing and receiving of a bill of lading for goods shipped. But, even if the characters of which we are speaking would bear the interpretation claimed for them, they would be glaringly inconsistent with the tenth clause of the bill of lading, in which a different and higher valuation is placed upon the mules.

Upon the record before us, we do not consider that we are called upon to review the authorities cited by counsel for plaintiff in error for the proposition that a statute such as we have (section 1294, p. 668, Va. Code 1904), providing that no agreement made by a transportation company for exemption from liability for injury or loss occasioned by its own neglect or misconduct as a common carrier shall be valid, does not prohibit the making of a contract between a common carrier and a shipper limiting the liability of the former for injury or loss occasioned by its own neglect or misconduct as a common carrier. In the cases decided by this court, holding that a common carrier can make a valid and binding contract, not exempting the carrier from liability for the negligence of itself or its servants, but limiting the amount in which the carrier shall be liable, in consideration of carriage at a reduced rate, it is declared that the test to be applied in all such cases is, was the contract fairly entered into, and are its terms just and reasonable?

If it were conceded that the terms of the contract here contended for by plaintiff in error are just and reasonable, it can-

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not, in the face of the facts to which we have adverted, be maintained that such a contract was fairly entered into by the defendant in error, and therefore instruction C, asked by plaintiff in error, was properly rejected.

The third assignment of error relates to the modification of plaintiff in error's instruction A, which, as given, the modification being italicized, is as follows:

"The court instructs the jury that if they believe from the evidence that the plaintiff is entitled to recover in this action, in assessing damages against the defendant, they must estimate the damages upon the supposition that the plaintiff's goods, live stock, etc., were only worth \$5 for every hundred pounds they weighed; that is to say, if the plaintiff's mule weighed 1,000 pounds then in estimating damages they must treat it as worth not more than \$50 when received by defendant, and the jury cannot find any more damages on account of injuries to the mule than the difference between \$50 and the value of the mule when it was delivered by defendant to the plaintiff, and under this bill of lading plaintiff can recover no more than \$50 for each mule injured: provided the jury believes the bill of lading was a special contract, fairly made in consideration of a special rate of transportation, and that the minds of the parties fairly met on the agreement."

To what we have said in considering the second assignment of error, all of which is applicable to the assignment here under consideration, it need only be added that the circuit court, in the absence of evidence, could not, as a matter of law, say what these characters, "Rel. Val. Lts. [or Ltd.] 5 cwt.," meant, or that the minds of the parties had met as to their meaning. Therefore the modification of the instruction is no ground of complaint on the part of plaintiff in error, since the most it could reasonably ask was to have submitted to the jury the question whether the parties understood and agreed that the characters had the meaning contended for by plaintiff in error in the instruction A, with the modification made to it by the court.

The remaining assignment of error is to the refusal of the court to set aside the verdict and grant plaintiff in error a new trial.

The evidence proves clearly the negligence—gross negligence—of plaintiff in error, resulting in injury to defendant in error's property, and the latter proves his whole bill of particulars filed in the cause, amounting to \$726.55, while the jury found for him a verdict of \$500 only, thereby leaving to plaintiff in error no ground whatever for complaint as to the amount of damages assessed against it.

The judgment of the circuit court is right, and will therefore be affirmed.

DENVER CITY TRAMWAY CO. *v.* NICHOLAS.

(Supreme Court of Colorado, Jan. 8, 1906. Rehearing Denied Feb. 5, 1906.)

[84 Pac. Rep. 813.]

Appeal—Discretion of Court—New Trial.—The determination of the court as to whether a new trial shall be granted for statements of counsel in argument will not be disturbed, except for clear abuse of discretion.

Same—Harmless Error—Admission of Evidence.—Permitting an expert, called by plaintiff in an action for injury to a child playing in a trolley car left by defendant in the street, to describe the different kinds of mechanical devices used on defendant's several cars, is harmless.

Same—Record—Presumption.—Where the abstract of record does not purport to contain the entire charge, it will be presumed that it substantially embraced instructions requested and refused.

Negligence—Places and Things Attractive to Children.—On the question of liability of a street railway company for injury to children from playing about cars left in the streets unguarded, the legality or illegality of the occupation of the street by the company is immaterial.

Same—Duty of Owner.*—Where children are attracted by and go on street cars left stored on a street by a railway company, it is the duty of the company to take reasonable precaution to prevent the children going thereon, or to protect from injury such as may be attracted thereto.

Same—Contributory Negligence of Children.†—Infants of tender years are not held to the strict rule of contributory negligence; but the care and caution required of them is according to their maturity and capacity only.

Same—Question for Jury.—Whether a child being 13 years old was *sui juris*, and therefore to be held to the strict rule of contributory negligence, is a question for the jury.

*For the authorities in this series on the subject of the negligence of railroad companies in maintaining places and things attractive and dangerous to children, and in failing to warn them of the dangers, see foot-note appended to *Fitzmaurice v. Connecticut Ry. & L. Co.* (Conn.), 18 R. R. R. 788, 41 Am. & Eng. R. Cas., N. S., 788.

†For the authorities in this series on the question of the degree of care required of children for their own protection, see foot-notes appended to *Murphy v. Boston Elev. Ry. Co.* (Mass.), 17 R. R. R. 838, 40 Am. & Eng. R. Cas., N. S., 838; foot-note appended to *Christensen v. Oregon Short Line R. Co.* (Utah), 16 R. R. R. 121, 39 Am. & Eng. R. Cas., N. S., 121; foot-notes appended to *Fishburn v. Burlington & N. W. Ry. Co.* (Iowa), 16 R. R. R. 444, 39 Am. & Eng. R. Cas., N. S., 444; foot-notes appended to *Rohloff v. Fair Haven & W. R. Co.* (Conn.), 15 R. R. R. 154, 38 Am. & Eng. R. Cas., N. S., 154.

For the authorities in this series on the question whether young children can be chargeable with contributory negligence, see foot-notes appended to *Birmingham Ry., L. & P. Co. v. Hinton* (Ala.), 17 R. R. R. 173, 40 Am. & Eng. R. Cas., N. S., 173; foot-note appended to *Rohloff v. Fair Haven & W. R. Co.* (Conn.), 15 R. R. R. 154, 38 Am. & Eng. R. Cas., N. S., 154; foot-note appended to *St. Louis, etc., Ry. Co. v. Colum* (Ark.), 11 R. R. R. 807, 34 Am. & Eng. R. Cas., N. S., 807; *Carney v. Concord St. Ry.* (N. H.), 11 R. R. R. 307, 34 Am. & Eng. R. Cas., N. S., 307.

Denver City Tramway Co. v. Nicholas

Appeal from District Court, Arapahoe County; F. T. Johnson, Judge.

Action by Joseph H. Nicholas, a minor, who sues by Joseph Nicholas, his next friend, against the Denver City Tramway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

The amended complaint, inter alia, avers: "That the Denver Consolidated Tramway Company, predecessor of the defendant, was possessed of certain cars moved and propelled by means of an electric current conveyed thereto by wire stretched over the railway. That the motor cars were equipped with an arm attached thereto upon the top of the cars, and moved vertically upon the hinge, and with a wheel upon the movable end thereof, called a trolley wheel, by which wheel and other devices the particulars whereof are unknown to the plaintiff, the electric current was conveyed to the car and the apparatus thereof, and by means thereof the cars were wont to be moved along the railway. That the motor cars were so adjusted that to suspend the motion thereof, the arm attached to them could be and was wont to be drawn and tied down, so that the trolley wheel was no longer in contact with the wire; that the cars were equipped with levers and other devices, the particulars whereof are unknown to the plaintiff, whereby, on releasing the arm and placing the trolley wheel in contact with the wire, and by moving the levers and other devices or some of them, the motor cars would again be set in motion at great speed; that the company was, and for a long time had been wont to assemble and store upon its tracks, upon Alaska street, the cars not at the time in use, and on the occasion in question was unlawfully maintaining and storing on one of its tracks, in the public street aforesaid, among other cars, one of the motor cars equipped as aforesaid. That the cars standing upon the street aforesaid were, as defendant well knew, attractive to children and youths, and that children and youths were and for a long time had been wont to resort to them to amuse themselves by imitating the actions, motions, and conduct of the employees of the company operating the said cars. That defendant had, during all the time aforesaid, omitted to erect any fence about the cars, or place said cars within any inclosure, or station any watchman or other person to warn off or exclude children therefrom; and during all the time aforesaid, had been wont to leave, and on the day and year in question had left, and was leaving and maintaining the cars aforesaid, including one of said motor cars in said Alaska street, entirely exposed, not inclosed, without maintaining any watchman or guard to warn or exclude any children therefrom, or by any means attempting to protect children attracted thereto, from injury by means of such cars; that on the day and year aforesaid, plaintiff and one Nelson Vaille, each being under the age of 13 years, and each being ignorant of the machinery and devices whereby said

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motor cars were set in motion, and all the uses of said devices, and ignorant of and not appreciating the great danger of attempting to move or operate and interfere with said cars, and plaintiff by reason of his youth being unable to appreciate or understand the danger of attempting to move or operate said cars, or interfere therewith or play about the same, and unable to resist his natural propensity to amuse himself with such cars, went to and got upon one of the said motor cars, and plaintiff and said Nelson were there amusing themselves for one-half hour or thereabouts, pretending to move, stop and again set in motion the said car. That in front of the car, upon the same track, was another car of defendant, unlawfully placed and maintained in the public street aforesaid, and that plaintiff and the said Nelson Vaille, or one of them, having untied the rope whereby said arm was drawn down, and having caused said movable arm to rise, so that the trolley wheel was against the wire, conveying the electric current as before set forth, plaintiff being ignorant of the uses and devices upon the front platform, and incapable to understand, know or appreciate the great danger of meddling or interfering therewith, carelessly moved one of said levers or some other of the devices aforesaid, and thereby suddenly set the car in motion at great speed and towards and upon and against the other cars standing in front thereof; and plaintiff being overcome with fright, and ignorant and unconscious of the great risk thereof, hastily attempted to dismount from said car, and in said attempt was caught between the moving car aforesaid and the car in front thereof, and one of the legs of plaintiff was thereby broken."

The instructions given by the court which are reported in the abstract are as follows: Instruction No. 1: "Plaintiff claims that the defendant was possessed of certain electric cars and left them exposed in a public street and with the appliances thereof unguarded and so insecure that the cars might be set in motion by children amusing themselves thereat, the defendant knowing that children were attracted and frequently had been attracted to such cars at the same place, and that plaintiff, being of tender years, seeing the cars so left, yielded to his natural propensity to amuse himself, and resorted thereto, and while playing about the cars the same were accidentally or ignorantly set in motion, and that by this means plaintiff was injured. Plaintiff's claim is that the injury was a permanent one, and will render him always incapable of labor or active movement. Plaintiff seeks to recover not only for this disability, but for the sufferings resulting from his injury." Instruction No. 2: "If the jury believe from the evidence that the defendant knowing that its cars were attractive to children and exposed them in a public street unfastened and unguarded, and in such a condition that a child playing thereat might ignorantly or accidentally set the same in motion, and that plaintiff was so inexperienced that he was unconscious of the danger which he incurred by amusing himself at the said cars

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and resorting thereto, and, by reason of the accidental or ignorant turning on of the current by the plaintiff, or the boy who was with him, the car was set in motion, and plaintiff, endeavoring to dismount therefrom, was injured, the verdict should be for the plaintiff." Instruction No. 4: "But the plaintiff is not to be allowed to recover if, upon all the evidence, it appears to you that he was conscious of the hazard and danger of resorting to the cars to amuse himself. But the conduct of plaintiff is not to be measured by the discretion of an adult person. No greater measure of prudence, circumspection, and discretion can be required of him than that reasonably to be expected of a child of the same age, capacity, and experience."

The facts appear to be that plaintiff, then being 13 years old, and a boy of about the same age were playing in the cars of appellant, the one assuming to be motorman, and the other conductor. The trolley pole of the car in which the boys were playing was tied down so that it was not in contact with the overhead wire. Vaille, the boy playing with plaintiff, untied the rope attached to the trolley pole, where it connected with the overhead wire. After a little while the car started and collided with another car upon the same track. The result was the crushing of the leg of plaintiff. Judgment was rendered for plaintiff in the court below, in the sum of \$1,500. Defendant brings the matter here by appeal, alleging that many errors occurred in the court below. Appellee's counsel in his opening statement to the jury said: "I wish to impress upon the jury that the plaintiff in this case was a boy, and the court will distinguish, in its instructions, the duty of a corporation using these public utilities and leaving them open so a child can hurt himself. There is a vast difference between the responsibility it owes to them, and to grown people; the law supposes that infinitely more care is to be exercised in the case of a child than that of a man." To this statement appellant's counsel objected, and the objection was overruled.

Charles J. Hughes, Jr., for appellant.

Ino. G. Taylor and Wells, Thompson & Chiles, for appellee.

BAILEY, J. (after stating the facts). The conduct of the trial and the control of counsel in the arguments and statements made to the jury is so fully within the discretion of the court, and the question whether a new trial should be granted for misconduct of counsel in his remarks to the jury resting in the sound, judicial discretion of the trial court, the matter will not be interfered with on appeal unless it manifestly appears that such discretion is clearly abused. *Hill v. Colo. Nat'l Bank*, 2 Colo. App. 324, 30 Pac. 489; *Felt v. Cleghorn*, 2 Colo. App. 4, 29 Pac. 813; *San Miguel Consld. Gold Min. Co. v. Bonner* (Colo. Sup.) 79 Pac. 1025; volume 5, Current Law, 255-263.

Another contention of appellant is that the court permitted plaintiff to call an expert witness to describe the different kinds

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of mechanical appliances used upon defendant's cars. The witness did not assume to know the kind that were used upon the particular car upon which the plaintiff was playing at the time, or shortly before, the accident. We do not see that the defendant could have been materially prejudiced or injured by a description of the different kinds of mechanical devices used upon its several cars.

The refusal of the court to give certain instructions requested by the defendant is assigned as error. The abstract of record before us does not purport to contain the entire charge of the court to the jury. We must, therefore, presume that the charge as given substantially embraced each of the instructions requested by defendant, to which it was by law entitled. 5 Current Law, and cases cited in note 40.

This brings us to the determination of the sufficiency of the complaint, and the correctness of the three instructions reported in the abstract as given by the court at the instance of the plaintiff, upon the correctness or incorrectness of which, and the sufficiency or insufficiency of the complaint, depends the entire case, as we view it. It is asserted that the complaint is defective because of the averment that defendant "unlawfully occupied and obstructed" Alaska street; that this does not amount to an allegation of a fact, but is a conclusion of law. For the purpose of this case, it may be conceded that this is true. In our judgment the merits of the case are not affected by the legality or illegality of the occupation of Alaska street by defendant company.

The other objection to the complaint goes to the merits of the case; that is to say, defendant contends that, if children were attracted by and went upon the appellant's cars, this does not in law imply a duty on its part to prevent them from going thereon. This, in brief, is the contention of defendant, and we may say that it is supported by some authority, but in our judgment the weight of authority and reason is against it.

Other objections are that plaintiff was a trespasser and that he was guilty of contributory negligence, and that the complaint upon its face shows that he was guilty of contributory negligence. There are other contentions of a like character. What we will presently say we think will show that there is no merit in these contentions, according to the rule adopted by many of the states, the United States Supreme Court, and heretofore mentioned with favor by both this court and the court of appeals. This rule is as follows: "If an owner sees fit to keep on his premises something that is an attraction and allurement to the natural instincts of childhood, the law imposes upon him the corresponding duty to take reasonable precautions to prevent the intrusion of children, or to protect from personal injury such as may be attracted thereto." *Kopplekom v. Colo. Cement Co.*, 16 Colo. App. 278, 64 Pac. 1047, 54 L. R. A. 284. Perhaps this doctrine was first announced in the case of *Lynch v. Nurdin*,

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4 Perry & Davidson's Reports, which was a case of an expressman who left his empty cart and horse on the street. Some children engaged in playing with it and one of them was injured, the court saying: "Suppose that the plaintiff merely indulged in the natural instincts of a child in amusing himself with the empty cart and deserted horse, then we think that the defendant cannot be permitted to avail himself of that fact. The most blamable carelessness of his servant having tempted the child, he ought not to reproach the child for yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care; the child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them." This was followed by the courts of Connecticut in *Birge v. Gardner*, 19 Conn. 507, 50 Am. Dec. 261, which was a case in which a child was injured by swinging on a gate. In the case of *Stout v. R. R. Co.*, 2 Dill. 294, Fed. Cas. No. 13,504, this rule was adopted by Judge Dillon in his charge to the jury, and was afterwards affirmed by the Supreme Court of the United States in *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745, in which the cases of *Lynch v. Nurdin* and *Birge v. Gardner*, *supra*, were cited in support of the doctrine.

As to the contributory negligence of plaintiff, and the contention that he could not recover because he was a trespasser, in the case last cited it is said: "It is well settled that the conduct of an infant of tender years is not to be judged by the same rule which governs that of an adult. While it is the general rule in regard to an adult that to entitle him to recover damages for an injury resulting from the fault or negligence of another, he must himself have been free from fault. Such is not the rule in regard to an infant of tender years. The care and caution required of a child is according to his maturity and capacity only, and this is to be determined in each case by the circumstances of that case." The same rule is announced in *R. R. Co. v. Gladmon*, 15 Wall. 401, 21 L. Ed. 114. This court in the case of *Street Ry. Co. v. Sherman*, 25 Colo. 114, 53 Pac. 322, 71 Am. St. Rep. 116, where the doctrine of the *Lynch*, *Birge* and *Stout* Cases was approved, said: "In applying the rule that he who seeks to recover damages for a personal injury suffered from the negligence of another, must not himself be guilty of negligence that substantially contributed to the result, the law discriminates between children and adults, the feeble and strong, and only requires of each that degree of care to be expected in view of his age and condition." In *Elliott on R. R.*, § 1261, it is said: "The general rule is well settled that children are only required to exercise such care for their own safety as may be reasonably expected in view of their age and condition. This question is usually one for the jury to determine." And sufficient authorities cited by the author in support of this doctrine.

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It is asserted by defendant that this boy, being 13 years of age, was sui juris. This is a question which was properly left to the jury to say by their verdict whether he was or was not (*Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455, 98 Am. Dec. 66), and was sufficiently presented to the jury by the instructions reported in the abstract.

As to the issues of fact, we do not think it necessary to examine minutely the evidence on which it is said that the jury came to a wrong conclusion in their verdict. Every cause must depend upon its own circumstances. Our business is to see that true principles of law are applied to the circumstances as developed in this case. We are of the opinion that the complaint does state facts sufficient to constitute a cause of action; that the instructions given by the court are in harmony with the law, and that there was legal evidence upon which the jury might base its verdict. It may be well to say that in addition to the authorities cited in support of the doctrine herein announced, many more may be found. The same rule has been practically adopted in Minnesota, Kansas, Texas, Missouri, and Illinois.

Taking it all in all, we are inclined to believe that the doctrine adopted by this court is the better policy. The judgment of the district court will therefore be affirmed.

Affirmed.

GABBERT, C. J., and GODDARD, J., concur.

MISSOURI, K. & T. RY. CO. OF TEXAS *et al.* v. AVIS.

(Supreme Court of Texas, May 16, 1906.)

[93 S. W. Rep. 424.]

Carriers—Injuries to Passengers—Actions—Pleading—Admissions.

—In an action for injuries to plaintiff while traveling on a stock pass, defendants alleged that at the time of the injury they had promulgated a rule prohibiting passengers from riding on their engines; that plaintiff disregarded the rule, and negligently and against defendants' consent, went on the top of the cars, and in and upon the engine of the train on which he was riding and was thereby injured. Held, that the allegation that defendant companies "promulgated a rule" should be construed as alleging that the rule was in force at the time of the accident, and was therefore sufficient to raise an issue as to whether the rule was then existing under Rev. St. 1895, art. 1193, declaring that plaintiff need not deny any special matter of defense pleaded, but that the same shall be regarded as denied unless expressly admitted.

Same — Rules — Violation — Effect — Contributory Negligence.*—

Where a rule established by certain carriers prohibited persons riding on stock passes from riding in other parts of the train than

*For the authorities in this series on the subject of contributory negligence of passengers in violating rules or regulations of the carrier, see foot-notes appended to *Cincinnati, etc., R. Co. v. Lohc* (Ohio), 8 R. R. R. 447, 31 Am. & Eng. R. Cas., N. S. 447.

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in the caboose, and declared that a failure to comply with the rule should be prima facie evidence of negligence on the part of the passenger if injured, a violation of the rule did not necessarily preclude a recovery but only shifted the burden of proof on the question of plaintiff's contributory negligence.

Error to Court of Civil Appeals of Second Supreme Judicial District.

Action by J. D. Avis, Jr., by his next friend, against the Missouri, Kansas & Texas Railway Company of Texas and others. From a judgment for plaintiff, affirmed by the Court of Civil Appeals (91 S. W. 877), defendant brings error. Affirmed.

Garnett & Eldridge, for plaintiffs in error.

Montgomery & Hughes, L. H. Mathis, R. E. & C. C. Huff, and J. H. Barwise, for defendant in error.

GAINES, C. J. This suit was brought by J. D. Avis, as next friend in behalf of his minor son, J. D. Avis, Jr., to recover of the defendant corporation damages for injuries inflicted upon him while a passenger on a live stock train of the defendant the Missouri, Kansas & Texas Railway Company, traveling upon a drover's pass.

The following is the case made by the pleadings and the evidence. J. D. Avis, the father, shipped certain cattle from Wichita Falls, Tex., to St. Louis, Mo., over the lines of the defendant companies. As a part of the contract of shipment it was agreed that the son, J. D. Avis, Jr., should accompany the cattle on a drover's pass, but in the agreement it was also stipulated that: "(7) The shipper, party or parties in charge of said cars will only be carried on the train drawing said cars, and in accordance with the rules on the back hereof, and his or their failure to observe said regulations shall be prima facie evidence of negligence on their part in case of injuries resulting therefrom." This was signed by the plaintiff. One of the rules referred to in the stipulation is as follows: "The party or parties in charge of this stock shall and they hereby agree to observe the following regulations and identify themselves whenever required to do so by any conductor: (1) Remain in the caboose attached to the train drawing said cars while the train is in motion." While the plaintiff was riding upon the engine of the train of the Missouri, Kansas & Texas Company there was a collision with another train going in the opposite direction, which resulted in a fracture of his leg and other injuries. The plaintiff was 16 years of age at the time of the accident. When we granted the application for the writ of error, we were of the opinion that the Court of Civil Appeals had correctly disposed of the assignments of error save in one particular; and we are still of that opinion. Therefore we deem it unnecessary to discuss the assignments in detail, and shall confine our remarks to two points—one as to the introduction of evidence tending to show an abrogation of the rule prohibiting passengers at-

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tending shipments of live stock from riding upon any part of the train except the caboose, and the other as to the effect of the stipulations in the contract with reference to the same matter.

1. The defendants having pleaded a rule "promulgated" by them prohibiting passengers upon their stock trains from riding elsewhere than in the caboose, upon the eve of the trial, the plaintiff filed a supplemental petition, alleging that the rule had been abrogated by a failure to enforce it, whereupon the defendant moved to continue the cause in order to procure testimony to disprove the allegation. Thereupon the plaintiff withdrew the allegation and the motion was overruled. During the course of the trial, the plaintiff offered testimony tending to show, that the rule was not enforced, which was objected to by the defendants for want of pleading and upon other grounds. The objection was overruled and the testimony was admitted. After some difficulty we have concluded that the court did not err in this particular. The correctness of the ruling depends upon the state of the pleadings after the withdrawal of the supplemental petition. The sixth paragraph of defendants' amended original answer, contained these allegations: "* * * That at the time of the alleged injuries to said J. D. Avis, Jr., defendant had promulgated a rule prohibiting passengers from riding upon the engines of defendants. Defendants further say that plaintiff J. D. Avis, Jr., disregarded each and all of said warnings and ruling which were known to him or could have been known to him by the use of ordinary care, and that he negligently and against the consent of defendants went upon the top of the cars, and in and upon the engine of defendants, and was thereby injured, if injured, and but for such negligence of said plaintiff J. D. Avis, Jr., said accident to him and said alleged injuries would not have occurred." To say, that the defendant companies "promulgated a rule" does not expressly allege that they had a rule in force; but under the rule of this court for governing the practice in the trial courts, which requires that in the absence of a special exception every reasonable intendment should be given to an allegation, we think that the language should be construed as meaning that the rule was promulgated and was enforced. Article 1193 of our Revised Statutes 1895—prescribes that: "It shall not be necessary for the plaintiff to deny any special matter of defense pleaded by the defendant, but the same shall be regarded as denied unless expressly admitted." Therefore, if the allegation of the answer as to the promulgation of the rule is to be given any effect, it was an issue in the case, under the pleadings, whether such rule was at the time of the accident an existing rule of the company. The testimony admitted tended strongly to show, that no such rule was observed or attempted to be enforced. We conclude that it was not error to admit the testimony.

2. When we granted the application for the writ of error we were inclined to think that the stipulation in the contract of

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shipment, to the effect that the passenger who accompanied the cattle on the trip should ride in the caboose while the train was in motion, precluded a recovery by the plaintiff. But in this we now think we were in error. The stipulation not only binds the plaintiff to observe the rules referred to, but goes further and provides the consequences of a failure to do so; that is, that the failure should be prima facie evidence of negligence on his part. Since the stipulation mentions no other consequence for its breach, we think it clear, that none other should be held to follow from it. Its only effect was to shift the burden of proof upon the question of contributory negligence in case an injury resulted to the plaintiff while riding elsewhere than in the caboose. This effect was given to the stipulation by the charge of the court, by which the jury were distinctly instructed, in substance, that in order to justify a recovery by plaintiff the testimony must show that he was not himself—negligent in riding upon the engine.

We find no error in the judgment, and it is accordingly affirmed.

ST. LOUIS, I. M. & S. RY. CO. v. CARAWAY.

(Supreme Court of Arkansas, Jan. 6, 1906.)

[91 S. W. Rep. 749.]

Master and Servant—Injuries to Servant—Railroads—Brakemen—Negligence.—Where the duties of a railroad brakeman require him to climb down the side of a box car frequently, his act in so doing was not negligence per se.

Same—Violation of Rules.*—Violation by a servant of rules promulgated by the master for the protection of a class of employees to which he belongs, under such circumstances as those attending the injury, is contributory negligence as a matter of law.

Same—Habitual Violation—Instructions.†—Where, in an action for death of a brakeman, defendant claimed that deceased was guilty of contributory negligence as a matter of law in violating a rule which plaintiff contended had been abrogated by nonobservance, instructions that, if the rule had been openly, continuously, and habitually disregarded by defendant's employees and to its knowledge for a number of years, it was unavailable to defendant, were proper.

Same—Superior Servants—Conductors.†—Where a rule regulating

*For the authorities in this series on the subject of contributory negligence of and assumption of risks by employees failing to comply with their masters' rules and regulations, see foot-note appended to *Baltimore & O. R. Co. v. Doty* (C. C. A.), 17 R. R. R. 753, 40 Am. & Eng. R. Cas., N. S., 753; foot-note appended to *Illinois Cent. R. Co. v. Stith's Adm'r* (Ky.), 16 R. R. R. 729, 39 Am. & Eng. R. Cas., N. S., 729; foot-notes appended to *Moore v. St. Louis, etc., Ry. Co.* (La.), 16 R. R. R. 370, 39 Am. & Eng. R. Cas., N. S., 370; foot-notes appended to *Demko v. Carbon Hill Coal Co.* (C. C. A.), 16 R. R. R. 232, 39 Am. & Eng. R. Cas., N. S., 232.

†For the authorities in this series on the subject of waiver of rules made for the guidance and protection of employees, see foot-notes appended to *Canadian Pac. Ry. Co. v. Elliott* (C. C. A.), 15 R. R. R. 621, 38 Am. & Eng. R. Cas., N. S., 621.

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railroad brakemen constituted conductors of trains the representatives of the company for its enforcement, knowledge acquired by such conductors that the rule was habitually violated and that it had fallen into disuse was imputable to the company.

Same—Inference of Knowledge.—Knowledge on the part of a railroad company of the violation of a rule regulating brakemen may be inferred from the notoriety of the habitual custom of the employees to disregard the same.

Death—Damages—Excessiveness.—Where, in an action for death of a brakeman having an earning capacity of \$75 a month, his widow testified generally that he furnished support for herself and child, but could not state the amount contributed, except that he paid the grocery bills, house rent, and clothing, amounting to \$18 per month, a verdict in favor of the widow for \$8,000 was excessive, and should be reduced to \$5,000.

Appeal from Circuit Court, Craighead County; Allen Hughes, Judge.

Action by T. H. Caraway, as administrator of the estate of H. A. Stephenson, against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed conditionally.

B. S. Johnson, for appellant.

J. F. Gautney, *T. H. Caraway*, and *N. F. Lamb*, for appellee.

McCULLOUGH, J. This is an action brought by the administrator of the estate of H. A. Stephenson, deceased, against the St. Louis, Iron Mountain & Southern Railway Company to recover damages for the alleged negligent killing by the train of defendant. Damages were laid in the sum of \$25,000, and the jury returned a verdict in favor of the plaintiff for \$2,000 to the estate for the pain and suffering endured by decedent after he was struck by the train and \$8,000 for the benefit of the widow and child of decedent. Stephenson was employed by the railway company as brakeman on a through freight train; his run being between Little Rock, Ark., and Poplar Bluff, Mo. As his train came into the terminal yards near Little Rock about midnight, he was struck by a coal car standing on a side track, knocked to the ground, and run over by the cars of his train. From the injuries sustained he suffered great pain, and died a few days thereafter. The coal car had by other employees of the defendant in the yard been left so near the end of the side track on which it stood that sufficient space did not intervene between it and cars passing on the adjoining track, and Stephenson was struck by it while he was on the side of a box car of his own train. It is not contended that there was any error in the instructions or verdict as to the question of negligence of defendant's servants in leaving the coal car in the position named, or that the position of the coal car did not cause the injury complained of. So those questions may be treated as settled. It is only contended that Stephenson, in leaving his post of duty on top of his train and climbing down

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the side of the box car, was guilty of negligence which contributed to the injury, and that for that reason no recovery can be had. No one saw Stephenson when he was struck. He was the forward or head brakeman on the train, and one of the other brakemen on the train testified that he saw the swinging light from Stephenson's lantern just before he climbed down the side of the car. Both of the other brakemen testified that they heard his groans as their end of the train passed the spot where he had fallen, that they found him lying on the ground, and that he told them the coal car had knocked him off the side of the box car. They also testified that they saw the position of the coal car, and that it was close enough to strike a man on the side of a passing box car. There was no proof as to the purpose of Stephenson in climbing down the side of the car, except that it was the uniform custom of the brakemen, when they came into the yards at the end of a run, to get down from the train before it stopped, and wait for the caboose to come up, and then deposit their lanterns therein. The proof shows that the rules of the company required them to deposit their lanterns in the caboose before leaving the yards for their respective homes or stopping places.

Appellant, to establish contributory negligence on the part of Stephenson, introduced in evidence and relied solely upon the following rule of the company, viz.: "On freight trains having two brakemen it will be the duty of these men to ride on the top near the front and rear end of same, and the conductor in the center of the train approaching all meeting points, down or up grades, through stations and entering yards. On trains having three brakemen, the forward and rear brakeman will station themselves as above; the swing or middle brakeman will take a position near the middle of the train on top, in order to properly take signals from either end. The object of locating the trainmen as herein stated is in order to control the train when necessary or to assist in stopping or steadying the train when going down or up grade, and to change the brakes as frequently as is necessary to prevent heating wheels or sliding them flat. The use of a stick to set brakes is strictly prohibited. Conductors in charge of trains will instruct their men in regard to the above, and know that they occupy such positions. The conductor, being in charge of the train, will have authority to require brakemen to change positions with each other, when, in his opinion, it is necessary. On entering terminals, trainmen will remain in their assigned positions and in charge of the train until the train has cleared the switches which they pull in on." It is also shown that Stephenson knew of the existence of this rule when he accepted employment from the company, and it is claimed that he was guilty of contributory negligence in violating it. It cannot be said to be negligence per se for a brakeman on a freight train to climb down the side of a box car. His duties require him to do so frequently,

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and whether or not it is negligence to do so at a particular time or under given circumstances is a question of fact for a jury to determine. The doctrine is well established that violation by the servant of rules promulgated by the master for the protection, under such circumstances as those attending the injury, of the class of employees to which he belongs, is of itself contributory negligence, and should be so declared as a matter of law. 1 Labatt on Master and Servant, § 365; Dresser on Employers' Liability, § 109. The rule in question was manifestly adopted, not for protection of the servants, but to measure the servant's duty to the master in the performance of his work. It states in terms that the object was to require the brakemen to be in position to handle the train. Whether the violation by the servant of such a rule made solely for the benefit of the master can be held to be negligence per se is another question altogether, and one which it is not necessary to decide in this case. The reason upon which the authorities base the doctrine of contributory negligence in violating rules seems to lead to the conclusion that it would not apply to such a rule as this. 1 Labatt, § 365a, and cases cited; L. R. & Ft. S. Ry. v. Eubanks, 48 Ark. 460, 3 S. W. 808, 3 Am. St. Rep. 245.

Be that as it may, there was proof tending to show that this rule, so far as it required trainmen on entering terminals to remain on top of the train until it cleared the switches on which it entered, was uniformly, openly, and habitually disregarded by the trainmen for a considerable period of time, to the extent that they got off the trains and started back to the caboose, or waited for it to come up before the train came to a stop. The court submitted to the jury the question of the abrogation of the rule in this respect upon the following instruction, to wit: "(7) You are instructed that, while Stephenson was presumed to know the rule in evidence and that it was his duty to obey the same so long as it was in force, if you find from the evidence that for a number of years this rule has been openly, continuously, and habitually disregarded by the employees of defendant for such period, and to such an extent as to lead to and justify the belief that the rule had been abrogated by the company, or its nonobservance acquiesced in, then the nonobservance of the rule by Stephenson will not of itself bar a recovery, provided that you find that the nonobservance of the rule was for so long a period and of so frequent occurrence as to cause you to believe that the railway company must have known of and acquiesced in its nonobservance; and in determining whether or not the rule had been abrogated, or its nonobservance acquiesced in, by the company, you may take into consideration the period of time, the extent to which and openness with which the rule had been violated by the employees of defendant, if you find from the evidence that the rule had been violated." The court also gave the following at the request of the defendant: "(14) you are instructed that it would make

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no difference, if you find that the decedent knew the rule (or that the facts in evidence charged him with notice of it) that other employees frequently and customarily disregarded it. To make this reply avail as an excuse for nonobservance by the deceased, you must find from the evidence that the defendant railway company knew of the practice of the employees in disregarding the rule and acquiesced in such practice in such a way as to sanction it, or to be held practically to have abrogated it." These instructions correctly stated the law with reference to abrogation of rules by continued disregard of them acquiesced in by the employer, and there was evidence sufficient to sustain a finding by the jury that they had been abrogated. *L. R. M. R. & F. Ry. Co. v. Leverett*, 48 Ark. 333, 3 S. W. 50, 3 Am. St. Rep. 230. "A custom in violation of a rule, known and acquiesced in by the employer or his representatives, amounts to an abandonment of the rule to the extent to which the custom infringes the rule. * * * In other words, evidence that the rule in question was habitually violated to the knowledge of the employer is admissible for the purpose of repelling the inference which would otherwise be drawn, as a matter of law, when the violation is proved." 1 Labatt, § 232; Dresser, p. 521; *Tullis v. Lake Erie & W. R. Co.*, 105 Fed. 554, 44 C. C. A. 597; *Fluhrer v. Lake Shore & Mich. So. Ry. Co.*, 121 Mich. 212, 80 N. W. 23.

But it is contended that there was no proof that the habitual violations of this rule were known to the superior officers of the railroad company or those authorized to bind it by acquiescence in the disregard of the rules. The conductor was, by the rule itself, constituted the representative of the company for its enforcement. It was his duty to enforce the rule or report infractions thereof to his superiors, and as to his subordinates acquiescence by him in the violations of the rules was the act of the company. There is abundant proof that the conductors must have known of the habitual violation of this rule by brakemen, and the jury were warranted in so finding. *C., C., & St. L. Ry. Co. v. Baker*, 91 Fed. 224, 33 C. C. A. 468; *Tullis v. Lake Erie & W. R. Co.*, supra; *Mason v. Railroad*, 111 N. C. 482, 16 S. E. 698, 18 L. R. A. 845, 32 Am. St. Rep. 814; *Railroad v. De Bray*, 71 Ga. 406; *Boatwright v. Northeastern Railroad Co.*, 25 S. C. 129. Moreover, knowledge of the company may be inferred from the notoriety of the habitual custom of the employees in disregarding the rule. Lawson, *Usages and Customs*, § 21; *Fluhrer v. Lake Shore & Mich. So. Ry. Co.*, supra; *Lowe v. Ry. Co.*, 89 Iowa, 420, 56 N. W. 519; *C., C., & St. L. Ry. Co. v. Baker*, supra; *Tullis v. Lake Erie & W. Ry. Co.*, supra; *Barry v. Hannibal & St. J. R. Co.*, 98 Mo. 62, 11 S. W. 308, 14 Am. St. Rep. 610; *McNee v. Coburn Trolley Track Co.*, 170 Mass. 283, 49 N. E. 437.

All the other issues were fairly submitted to the jury upon proper instructions and we find no error in that respect. The evidence was abundant to establish the liability of appellant.

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No complaint is made by the appellant as to the amount of the verdict of \$2,000 assessed by the jury to cover the element of pain endured by the deceased; but it is contended that the verdict of \$8,000 on the other branch of the case is excessive. The evidence establishes the earning capacity of deceased at about \$75 per month, but it fails to show what amount he contributed to the support of his family. His widow, the only witness who testified upon the subject, was repeatedly asked on direct examination and cross-examination to state the amount of such contribution; but she could give little information on the subject. The only statement she gave concerning the amount of contributions sufficiently definite to rest an estimate of damages upon was that while they lived at Alicia, Ark., he paid the grocery bills, house rent, and clothing for herself and child, \$18 per month. She testified in general terms that he furnished a support for herself and child, but did not state the amount contributed. It is certain from the proof that he contributed more than \$18 per month, but there is no means of ascertaining from the proof what amount he did contribute. The jury were not warranted in supplying the deficiency in the proof from their personal knowledge of the probable cost of supporting the family, especially where it fails to show even the style of circumstances in which they lived. There was some proof tending to show that his habits and character were such that his care and moral training of his child were of some value, and, under the rule stated in *Railway v. Sweet*, 60 Ark. 550, 31 S. W. 571, the jury were warranted in assessing some amount of damage on that score, but the evidence here does not authorize a large amount. Taking the proof in the record we have no hesitancy in saying that the verdict is excessive. The liability of appellant being established by the verdict upon instruction free from error and evidence sufficient in support, it remains only for us to fix the minimum amount of recovery which we think the jury should have assessed under the evidence, and require appellee to remit the judgment down to the proper amount or suffer a new trial.

We think that the judgment is excessive to the extent of \$3,000, and if appellee will, within 15 days, remit that amount, the judgment will be affirmed for the remainder; otherwise, it will be reversed, and the cause remanded for a new trial.

ST. LOUIS & N. A. R. Co. v. MATHIS.

(Supreme Court of Arkansas, June 24, 1905. On Rehearing, Jan. 6, 1906.)

[91 S. W. Rep. 763.]

Master and Servant—Injuries to Servant—Contributory Negligence.*—A railroad section hand, who was killed by a train while helping to remove a hand car from the track under the orders of the foreman, was not guilty of contributory negligence in obeying the orders of the foreman and in relying on his vigilance to avert danger.

Same—Negligence of Master—Sufficiency of Evidence.—In an action against a railroad for the death of a section hand who was killed by a train while removing a hand car from the track under orders of his foreman, evidence held sufficient to authorize a finding of negligence on defendant's part.

Death—Damages—Elements of Compensation—Loss of Parental Care.—In an action by minor children for the death of their parent, the industry, moral character, and parental care and affection of deceased may be taken into consideration in assessing the damages.

Constitutional Law—Encroachment on Judiciary—Limitation of Appellate Jurisdiction.—Kirby's Dig. § 6217, authorizing the circuit judge, on motion for new trial in an action for the recovery of damages measured by an indeterminate standard, to indicate that he deems the verdict excessive, and providing that, upon such indication, if the losing party offers to file a release of errors and the prevailing party refuses to remit the amount of the excess, the verdict shall be set aside, is binding both upon the circuit and Supreme Court, and is consequently an unconstitutional limitation of the appellate jurisdiction vested in the Supreme Court by Const. art. 7, § 4, which provides that final judgments in inferior courts may be brought into the Supreme Court in such manner as may be prescribed by law.

Death—Damages—Restriction to Pecuniary Loss.—While the amount of damages to be awarded to minor children for the loss of parental care caused by the death of their father is indeterminate, and is to be left to the sound discretion of the jury, yet the jury must proceed on the theory of compensation for pecuniary loss, and the court must see that the limit of such compensation is not exceeded.

Same—Amount of Damages.—In an action for death of a railroad section hand who left surviving him five minor children, there was evidence that deceased contributed to the support of his family about \$350 per annum, in addition to other earnings made in the supervision of a farm; that the present value of an annuity in that sum for his life expectancy would be \$4,690; that he was an industrious man and especially solicitous as to the training of the children. Held, that \$8,000 would be a sufficient compensation for the loss occasioned by the death of the deceased, and a verdict for \$10,000 would be reduced accordingly.

Hill, C. J., dissenting.

Appeal from Circuit Court, Carroll County; John N. Tillman, Judge.

*For the authorities in this series on the subject of assumption of risks and contributory negligence in doing dangerous work in obedience to orders, see foot-notes appended to *Weed v. Chicago, etc., Ry. Co.* (Neb.), 13 R. R. R. 797, 36 Am. & Eng. R. Cas., N. S. 797; *Stewart v. Texas & P. Ry. Co.* (La.), 13 R. R. R. 158, 36 Am. & Eng. R. Cas., N. S., 158; *Kansas City, M. & B. R. Co. v. Thornbill* (Ala.), 14 R. R. R. 851, 37 Am. & Eng. R. Cas., N. S., 851.

St. Louis, etc., R. Co. v. Mathis

Action by James Mathis, as administrator of the estate of John Gunn, deceased, against the St. Louis & North Arkansas Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed on condition.

G. J. Crump, J. V. Walker, J. M. Moore, and W. B. Smith, for appellant.

Festus O. Butt and Charles D. James, for appellee.

MCCULLOUGH, J. This is a suit brought against appellant railroad company by the administrator of the estate of John Gunn, deceased, for the benefit of the widow and the next of kin of said decedent for damages occasioned by reason of the alleged negligent killing of deceased by a train of appellant. Damages are laid in the sum of \$25,000, and plaintiff recovered judgment for \$10,000, from which the defendant appealed.

Appellant claims that the evidence is insufficient to sustain the verdict, and that the court erred in refusing to instruct the jury, peremptorily, to return a verdict in its favor, but concedes that, if the testimony is legally sufficient, there was no error in the instructions or other proceedings. Deceased was a section hand employed by appellant, and worked under one Lisk as foreman. On the morning of September 2, 1901, deceased and the foreman and gang of which he was a member, started on a hand car from Coin, a station on appellant's road, to the place of their labor of the day. After running only about one-fourth of a mile they discovered the approach of a local freight train, and hastily stopped the hand car and endeavored to remove it from the track. It is contended on behalf of appellee that Gunn was killed while assisting, under orders of the foreman, in the removal of the hand car from the track, and while so engaged appellant was guilty of negligence, through its foreman, in failing to warn him of the imminent danger. Appellant claims, on the other hand, that Gunn was duly warned of the near approach of the train and, pursuant to the warning, left the track, but voluntarily returned to secure his dinner pail, and in so doing was struck by the engine and killed. On this point there is a sharp conflict in the testimony, and it is not the province of this court to determine where the weight lies. The foreman and several of the section hands testified that, when they discovered the approaching train, they, with deceased, stopped the hand car and tried to lift it off the track, and partially succeeded, but one end of the car was against a stump and they failed to get it off; that the foreman then called out to the hands to leave the car, and they all ran up the hill and across a ditch about 12 feet away from the track, when deceased returned to the car to get his dinner pail and was struck by the train. George Carson, a witness introduced by the plaintiff, testified that he was about 200 yards away, and saw the accident, which he described as follows: "There was one man standing at the left corner of the car, and when they went to

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throw the car off they threw the car this way, one side, and there were three at that end and two at this, and, when it caught that way, the car dropped down, the hind end, and they seemed to give away and let it drop two or three times before they got it off. About the time I thought they had shoved the car off the track, two of these men run right around the car there this way, and this man left at this corner had never raised up out of a stooping position, and these two men, just as they passed by, the engine struck the car, they just got away. Q. Before the car was struck, had any of these men left the track and gone back? A. No, sir; I never saw any come back, no man at all.” George Gunn, a son of the deceased, testified that the accident occurred in his view, and he described it as follows: “Well, like this way; the track [indicating] and the car running up that way, and they were all on there running. He was right there on the front end, and when they got ready to get off the car, why three of them got off at one end and two at the other end, and they moved the car around and got it across the track that way, and then went to lifting the car, and got it, it looked to me like, pretty near off, and part of the men started to run up the bank, and two of them stayed with that end of the car, and it looked to me like, I know it got one of them, and looked like the other one just got away. Q. Which way were you looking? A. I was looking right up the track. Q. Was there anything in the track to obstruct your view? A. No, sir; he was struck at this corner of the car [indicating]. Q. And the other men ran around the car and ran up the bank? A. Yes, sir. Q. Had any of these men prior to that time left the hand car before that? A. They left just when the train was pretty close. Q. They left just about the time the train struck this man? A. Yes, sir. Q. Did you see anybody, before the train struck the car and the man—did you see anyone run up the bank and come back? A. No, sir; no, sir.” Two of the witnesses, John Bridgeford and T. L. Plummer, who were passengers on the train, testified that they looked out of the car window and saw the engine strike the hand car and a man who appeared to be trying to get it off the track, and that several of the men were running up the hill. The testimony of both these witnesses tended to show that deceased did not leave the hand car and return after crossing the ditch. The jury was, therefore, warranted in finding from the testimony that deceased was struck while at work under orders of the foreman, removing the car, and that he did not leave the track and then return in the face of the danger. Treating it as thus established that the deceased did not leave the hand car or track and return after receiving warning of the danger, there is no testimony tending to show contributory negligence on his part. Joining his fellow workmen at the accustomed meeting place that morning; he and they proceeded, by direction and command of the foreman, toward the place at which they were to

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work. If the train was then expected, and due care was not observed in awaiting its passage, it was the negligence of the foreman, who was vice principal, and not the negligence of the section hands. They met the train in a curve, and there is—evidence that no signal was given from the approaching train by whistle or bell. When the party discovered the approach of the train, they hastily descended from the hand car, and endeavored to remove it before the train reached them. If the jury found, as they were warranted in finding from the evidence, that deceased, while assisting in the removal of the hand car, was struck by the engine, without warning of the danger, a case of negligence against the appellant was made out. The language of the court in *St. L., I. M. & S. Ry. Co. v. Rickman*, 65 Ark. 138, 45 S. W. 56, is peculiarly applicable to the facts here. "What the plaintiff did was manifestly done in obedience to the orders of the foreman to get the car off quick. Plaintiff had a right to presume that the foreman, who was in a position to devote his whole attention to the approaching train and the efforts of his men to get the hand car off the track, could better determine than he what was best to be done under the circumstances. We do not think that the danger was so apparently imminent but that he could reasonably rely upon the direction of the foreman. He did so, and was injured. He should not be charged with contributory negligence under the circumstances." We think there was sufficient evidence to sustain a verdict for the plaintiff, and the court did not err in refusing to take the case from the jury.

It is set forth as a further ground for new trial that the verdict is excessive. The testimony fairly establishes the fact that deceased contributed to the support of his family as much as \$350 per annum, in addition to his earnings in supervision of his farm, and that the present value of an annuity in that sum for his expectancy would be \$4,690. He owned a small farm of 80 acres of land and was out of debt. It is also shown by undisputed testimony that he was a very industrious man, of good moral character, and was especially solicitous as to the mental and moral training of his children; that he was a kind and indulgent father, provided well for his family, and gave much attention to the proper instruction and education of his children. He had five children; the youngest being only two years of age at the time of the accident. This is a well-recognized element of damages in suits of this kind for the benefit of minor children, and it is held to be for the jury to say, from all the facts and circumstances found, what will be a fair compensation to the children for the pecuniary loss of the care and attention of the father in the way of training and instruction. *Railway Co. v. Sweet*, 60 Ark. 559, 31 S. W. 571; *Railway Co. v. Maddy*, 57 Ark. 306, 21 S. W. 472. The amount of damages of this kind being of an indeterminate character and left largely to the sound discretion of the jury, we cannot say, as a

matter of law, that the verdict is so excessive as to appear to have been given by the jury under passion or prejudice.

The judgment is therefore affirmed.

On Rehearing.

Counsel for appellant ask a reconsideration by the court of the question of excessiveness of the verdict, and, in doing so, they necessarily attack the validity of the act of April 25, 1901 (Laws 1901, p. 196, c. 125; Kirby's Dig., § 6217), which is as follows:

"An act to regulate the practice in the circuit courts in certain cases.

"Be it enacted by the General Assembly of the state of Arkansas:

"Section 1. The verdict of any jury rendered in any action for the recovery of damages where the measure thereof is indeterminate or uncertain, shall not be held to be excessive, or be set aside as excessive, except for some erroneous instruction, or upon evidence aside from the amount of the damages assessed, that it was rendered under the influence of passion or prejudice: Provided, that the circuit judge presiding at the trial may, on motion for a new trial filed by the losing party, if he deems the verdict excessive indicate the amount of such excess, and thereupon, if the losing party shall offer to file and enter of record a release of all errors that may have accrued at the trial if the prevailing party will remit the amount so deemed excessive, and the prevailing party shall refuse to remit the same, the verdict shall be set aside."

It is contended by learned counsel: First, that the statute applies only to practice in the circuit court and not to this court on appeal; and, next, that if it does apply to this court, it is void, because it is an unauthorized curtailment by the legislative branch of government of the appellate jurisdiction vested by the Constitution in the court. It seems plain to us that if the statute is binding upon the circuit court, unless it be held to be an unwarranted restriction upon the appellate jurisdiction of this court, it is also binding here on appeal, for the reason that this court only searches for errors in the proceedings below, and will reverse a case only on account of errors, either of omission or commission, of the trial court. Our inquiry, then, is whether the statute in question is valid so far as it attempts to control this court in the determination of cases on appeal. If it is, the effect of it is to prevent a review by this court of an erroneous assessment of damages made by a jury, and the failure of the trial court to correct the error. The right of appeal is, to that extent, cut off by the statute, if it be given full force. The statute also imposes upon an unsuccessful litigant, before he can accept a reduction of an excessive verdict, the penalty of surrendering his right of appeal.

The Constitution of the state confers upon this court, in the

broadest terms, appellate jurisdiction coextensive with the state. It provides that the Supreme Court shall have a general superintending control over all inferior courts of law and equity. The section fixing jurisdiction of the court is as follows: Section 4, art. 7: "The Supreme Court, except in cases otherwise provided by this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the state, under such restrictions as may from time to time be prescribed by law. It shall have a general superintending control over all inferior courts of law and equity; and, in aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of errors and supersedeas, certiorari, habeas corpus, prohibition, mandamus and quo warranto, and other remedial writs and to hear and determine the same. Its judges shall be conservators of the peace throughout the state, and shall severally have power to issue any of the aforesaid writs." It has been often held by this court that the appellate jurisdiction conferred by the Constitution upon the court cannot be enlarged or divested by the Legislature. *State v. Ashley*, 1 Ark. 279; *Ex parte Woods*, 3 Ark. 532; *Ex parte Anthony*, 5 Ark. 358; *State v. Jones*, 22 Ark. 331; *Ex parte Batesville & Brinkley R. Co.*, 39 Ark. 82; *Simpson v. Simpson*, 25 Ark. 487; *O'Bannon v. Ragan*, 30 Ark. 181. It follows, then, that unless the Constitution empowers the Legislature to limit the appellate jurisdiction of the court it cannot be done. It is contended on behalf of appellee that it was meant, by the use of the Constitution of the words "under such restrictions as may from time to time be prescribed by law," to confer upon the lawmaking body the power to limit the right of appeal. Placing this construction upon the language used the effect of the constitutional provision would be to give to the court only such appellate jurisdiction as the lawmaking body should see fit to leave it. Bearing in mind our scheme of constitutional government, both state and national, and the policy of dividing it into three co-ordinate branches of equal dignity and power within defined limits, we cannot believe that the framers of the present Constitution meant to thus subordinate the jurisdiction of the highest court of the state to the will of the Legislature. For, if it be held that the Legislature may limit the power of the court to review the decision of an inferior court in one respect, it may do so in another, and, if it may prohibit the court from reviewing one question in a case, it may prohibit the review of all questions, and may cut off the right of appeal altogether. Thus by the process of elimination the Legislature could strip the court of all appellate jurisdiction, and deny to litigants the right of appeal which is guaranteed by the Constitution. The manifest intention of the framers of the Constitution was, primarily, to give a right of appeal to the Supreme Court from all final judgments of circuit and chancery courts, but to vest in the Legislature the power to prescribe regulations as to manner of taking appeals and time within which the same may be taken

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and prosecuted. This is, we think, what is meant by the words "under such restrictions as may from time to time be prescribed by law." To construe it otherwise would be to make it read that the Supreme Court shall have only such appellate jurisdiction as may from time to time be prescribed by law. If the framers of the Constitution had intended to so limit the jurisdiction of the court, doubtless they would have employed a more appropriate and less ambiguous form of expression to convey that meaning. We therefore hold that it was beyond the power of the Legislature to prohibit an inquiry in this court as to the sufficiency of the evidence to sustain the amount of damages assessed by a jury, or require a litigant to surrender his right of appeal as a condition upon which he may accept the reduction by the trial court of an excessive verdict.

After careful reconsideration of the evidence in the case, we are constrained to believe that the verdict is for an excessive amount of damages. We said, in the former opinion, that the evidence warranted a verdict for \$4,690 damages to cover the probable contributions of deceased to the support of his family. This is certainly the utmost limit to which the jury could have gone upon this element of the damage. If we indulge the presumption that the jury confined the verdict to the limits warranted by the evidence as to this element, it leaves the sum of \$5,310 which must have been assessed to cover damages for loss of the care, attention, and moral training of the father to his children. It is difficult to determine what amount should be allowed upon this element of damages. It is indeterminate, and is ascertained by no fixed rules for admeasurement, and is left to the sound discretion of the jury. Yet there must be some limit to the amount to be allowed, and it is the plain duty of an appellate court to see that the just limits are not exceeded. It is often said that where loss of limb is sustained and great suffering endured, no amount of money will compensate therefor—that no amount of money might induce a person to voluntarily undergo the loss of limb and consequent suffering; yet that would be a highly improper basis upon which damages should be estimated. It is the duty of courts and juries to allow such a sum as will fairly compensate for the pecuniary loss. So, in a case of this kind, no amount of money can fully compensate children for the distress of mind suffered by them in the violent and painful death of the father, and in the loss of his affectionate care and attention, but the court must ascertain some just amount to allow in fair compensation for the injury. *Railway Co. v. Robbins*, 57 Ark. 384, 21 S. W. 886; *Railway Co. v. Maddy*, 57 Ark. 306, 21 S. W. 472; *Railway Co. v. Sweet*, 60 Ark. 550, 31 S. W. 571.

Believing, as we do, that the amount allowed by the jury, either upon one or the other of the two elements of damages, was excessive, it becomes our duty to remand this case for a new trial, or to require the plaintiff to remit the judgment

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down to such an amount as we can say the evidence fully warranted; there being no errors of law in the proceedings. We think that, upon the whole proof, considering the earning capacity of deceased and the amount of contribution he would probably have made to his family, together with the proof upon the other element of damages, that \$8,000 will compensate for the loss as fully as pecuniary compensation can be rendered. So, if the plaintiff will, within 15 days after this day, remit \$2,000 of the judgment, the same will be affirmed as to the remainder; otherwise, it will be reversed, and the cause remanded for a new trial.

It is so ordered.

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(Circuit Court of Appeals, Eighth Circuit, November 10, 1905.)

[141 Fed. Rep. 67.]

Writ of Error—Effect of Reversal—Right to Directed Verdict.—

The reversal of a judgment by an appellate court, on the ground that the trial court erred in refusing defendant's motion to direct a verdict in its favor, does not entitle defendant to a directed verdict on a second trial, unless the evidence is substantially the same.

Master and Servant—Action for Injury of Brakeman—Contributory Negligence.*—The mere fact that a plaintiff, while employed as a brakeman by defendant railroad company, was injured in coupling cars with a link and pin coupling, used by defendant in violation of Act March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174], creates no presumption that he was negligent, and unless his contributory negligence is conclusively shown by the evidence it is a question for the jury.

In Error to the Circuit Court of the United States for the District of Colorado.

Arrighi sued the railroad company to recover damages for an injury to his hand, caused as he alleges by the negligence of the company in not equipping its cars as provided by section 2 of the act of Congress of March 2, 1893 (27 Stat. 531, c. 196 [U. S. Comp. St. 1901, p. 3174]), relating to automatic couplers. In support of his case Arrighi introduced evidence, which was undisputed by the company, showing the following facts: While in the employ of the railway company as a switchman, and on the 19th day of November, at Salida, Colo., Arrighi was injured while endeavoring to effect a coupling of two narrow gauge freight cars, one of which was at the time employed in moving

*For the authorities in this series on the subject of what does, and does not, constitute contributory negligence in coupling or uncoupling cars, see foot-notes appended to *St. Lou's S. W. Ry. Co. v. Pope* (Tex.), 16 R. R. R. 736, 39 Am. & Eng. R. Cas., N. S., 736; *Taylor v. Boston & M. R. R.* (Mass.), 16 R. R. R. 397, 39 Am. & Eng. R. Cas., N. S., 397; foot-notes appended to *Brinkmeier v. Missouri Pac. Ry. Co.* (Kan.), 15 R. R. R. 349, 38 Am. & Eng. R. Cas., N. S., 349.

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interstate traffic. Neither car was equipped with couplers coupling automatically by impact. The drawbars of each were equipped with link and pin couplings. It therefore became necessary for Arrighi to go between the ends of the cars in the performance of his duties. Arrighi entered the employ of the railroad company November 12, 1901, and the seven days intervening between this date and the date of his injury was all the experience he ever had with link and pin couplings and as switchman. He was 32 years of age and had worked for seven or eight years for the Rock Island Railway Company as brakeman on passenger trains, but said trains did not use the link and pin coupling. There was no defect in the coupling itself which contributed to the accident. Arrighi was the only witness who testified as to how he made the coupling. He testified upon this matter as follows: "I went over and set my pin on the coupling at the end of a string of cars that was standing still, then I stepped back and gave the signal for the engineer to come ahead for me to make my coupling. The link was in the moving car coming towards me. I took hold of the link as the car approached to guide it, and when I got the link in the coupling my hand was caught, and I could not possibly get my hand out. I tried to get my hand out at the earliest time possible. It was necessary to raise the link in order to have it go into the drawhead on the standing car." There was no evidence whatever that Arrighi was in any wise negligent in the way he made the coupling unless the fact that he was injured is such evidence. Upon this state of facts the railroad company moved the trial court at the close of plaintiff's evidence to direct the jury to return a verdict in its favor, which motion was refused, and an exception taken to such ruling.

William W. Field (Joel F. Vaile and Charles W. Waterman, on the brief), for plaintiff in error.

William L. Dayton and Harvey Riddell, for defendant in error.

Before SANBORN, Circuit Judge, and PHILLIPS and CARLAND, District Judges.

CARLAND, District Judge, after stating the facts as above, delivered the opinion of the court.

This case was before this court on writ of error at a previous term of this court, and the judgment therein was reversed and a new trial ordered. *Denver & R. G. R. Co. v. Arrighi*; 129 Fed. 347, 63 C. C. A. 649. A new trial having been had, the case is again here on exception to the ruling of the trial court in refusing to direct a verdict for the railroad company. At the prior hearing of the case this court was of the opinion that a verdict ought to have been directed for the railroad company on account of the contributory negligence of the defendant in error. If the facts shown by the present record are the same as on the former hearing, the decision then made is the law of the case, and the

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judgment now sought to be reviewed must be reversed in accordance therewith. The evidence introduced at the first trial is not before us, except as it appears from the opinion of the court. We are convinced from an examination of the opinion that the evidence introduced at the second trial could not have been the same as that introduced on the first for the following reasons: It is stated in the opinion that Arrighi was thoroughly acquainted with the link and pin coupling. This fact does not appear in the record in this case. It is stated in the opinion that Arrighi adopted the most dangerous method of performing his duty. This fact does not appear in the record now under consideration. From all that now appears in the record he adopted the only way practicable to make the coupling. It is stated in the opinion that it did not appear that Arrighi ever made any effort to remove his hand. It appears in this record that he withdrew his hand as soon as possible. We therefore are of the opinion that we are not concluded by the judgment rendered when the case was first here.

Two grounds are seriously urged by the counsel for plaintiff in error why the judgment below should be reversed: First. That the decision of this court on the first writ of error absolutely entitled the plaintiff in error to a directed verdict in its favor. Second. That the evidence on the second trial affirmatively shows that Arrighi's injuries resulted from his own contributory negligence and not proximately from the failure of the railroad company to equip its cars with automatic couplers as prescribed by Act Cong. March 2, 1893, c. 196, 27 Stat. 531 [U. S. Comp. St. 1901, p. 3174]. The first point for the reasons heretofore stated we do not think well taken. The decision of the second point requires an examination of the evidence now before us. The act of negligence alleged against the company is not disputed, but it is urged that the evidence shows that Arrighi's want of ordinary care in making the coupling was the proximate cause of his injury and not the negligence of the railroad company.

The position of counsel for the railroad company may be stated thus: The trial court and this court must take judicial notice that thousands of couplings were made daily with link and pin couplers when they were in use without injury to the person making the same. Therefore, in a case like the one at bar, where the counsel for the company can point to no act of negligence on the part of Arrighi, the court must presume as matter of law that he was negligent because he was injured; there being nothing in the evidence to show that he was prevented in any manner from exercising ordinary care in making the coupling. If the court could take judicial notice that no man exercising ordinary care was ever injured in making couplings with link and pin, then there would be force in the position of counsel for the railroad company, but judicial notice is a two-edged sword in this case. If, on the one hand, the court shall judicially take notice that thousands of couplings were daily made with link and pin when

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they were in use without injury to the person making the same, we may also take judicial notice that the use of link and pin couplers are so inherently dangerous to life and limb that the attention of Congress was repeatedly called to the fact by the President and legislation urged to remedy the evil. 9 Messages and Papers of the Presidents, p. 51. The act under which Arrighi brings this action was the answer Congress made to the demand made upon it. We cannot presume that Congress legislated in order to protect careless and negligent employees alone; on the contrary, we must presume that Congress legislated because it was well known that employees in the exercise of ordinary care were continually being injured by the use of the link and pin coupler on account of its inherent danger. We conclude, therefore, that the mere fact that Arrighi was injured created no presumption against him, and that it was for the jury to say whether he exercised ordinary care in making the coupling. *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Northern Pacific v. Tynan*, 119 Fed. 288, 56 C. C. A. 192; *St. Louis I. M. & S. Ry. Co. v. Leftwich*, 117 Fed. 228, 54 C. C. A. 1; *Choctaw, O. & G. Ry. Co. v. Tennessee*, 116 Fed. 23, 53 C. C. A. 497.

Other errors assigned have been considered and found to be without merit. The judgment of the trial court must be affirmed, and it is so ordered.

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(Supreme Court of South Carolina, March 15, 1906.)

[53 S. E. Rep. 968.]

Negligence—Contributory Negligence.*—Contributory negligence is a want of ordinary care on the part of a person injured by actual negligence of another, combining and concurring with that negligence and contributing to the injury, and can never exist except where the injury has resulted from the negligence of the defendant as a concurrent proximate cause.

Master and Servant—Injury to Servant—Orders of Superior.—Where a conductor has, under the rules of a railroad company, control of the movement of trains, but the engineer has a right to disregard his order, if contrary to rules or dangerous to persons or property, the engineer is not responsible where the trains are moved by order of the conductor contrary to orders, where the conductor has been specially appointed pilot of the latter for the trip; he not being acquainted with the road or the trains running thereon.

Same.†—In running a train the conductor is a representative of the

*For the authorities in this series on the question, what is, and is not, contributory negligence, see foot-notes appended to *Normile v. Wheeling Traction Co.* (W. Va.), 18 R. R. R. 235, 41 Am. & Eng. R. Cas., N. S., 235; *South Chicago City Ry. Co. v. Kinnare* (Ill.), 18 R. R. R. 229, 41 Am. & Eng. R. Cas., N. S., 229.

†For the authorities in this series showing who are vice principals, or superior servants, whose negligence other employees do not as-

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company, and where an injury is caused by his negligence the company is liable.

Same—Release from Liability.—Under Const. 1895, art. 9, § 15, providing that every employee of a railroad corporation shall have the same remedies for an injury from the acts or omissions of the corporation or its employees as are allowed by law to other persons, when the injury results from the negligence of a superior, any implied agreement to release the company from liability to an engineer for negligence of a conductor while working under a rule providing that the engineer shall be jointly liable with the conductor for the movement of the trains, is null and void.

Same—Contributory Negligence.‡—A servant obeying the instructions of a representative of the master on the spot, is not guilty of contributory negligence in so doing.

Same.‡—The fact that an act of an engineer is done in the presence and under the immediate direction of a conductor of the train is equivalent to the assurance by the master that the servant may safely proceed to the work required of him.

Appeal from Common Pleas Circuit Court of Abbeville County; Klugh, Judge.

Action by W. A. Wilson against the Southern Railway. Judgment for plaintiff, and defendant appeals. Affirmed.

So much of the charge as pertains to the questions raised is: "The defendant answers the complaint by denying, first of all, that it was negligent, and alleges that the injury to the plaintiff, if he suffered injury, was caused by his own negligence solely, and in addition to that alleges that whatever injury the plaintiff may have sustained was caused by acts of his of a negligent character, which, in connection with the facts that he alleges in his complaint as constituting the negligence of the defendant, contributing along with those alleged facts or acts of negligence, caused his injury. As an affirmative defense the defendant relies upon the doctrine or defense of contributory negligence. If the defendant was not negligent at all, then, as a matter of course, the plaintiff would not be entitled to be compensated at the expense of the defendant. If the plaintiff suffered injury and it was the result solely of his own negligence or carelessness, as a matter of course he cannot claim compensation from the defendant for injury caused by such cause as that, his own negligence. Where two persons are in fault, and one suffers injury because of the joint fault of both, the law will not allow him to recover from the other in damages by reason of that injury, be-

sume under the fellow-servant rule, see foot-notes appended to *Chicago Union Traction Co. v. Sawusch* (Ill.), 18 R. R. R. 856, 41 Am. & Eng. R. Cas., N. S., 856; *Howard v. Chesapeake & O. Ry. Co.* (Ky.), 18 R. R. R. 842, 41 Am. & Eng. R. Cas., N. S., 842.

‡See foot-notes appended to *Edgar v. New York, etc., R. Co.* (Mass.), 18 R. R. R. 403, 41 Am. & Eng. R. Cas., N. S., 403; foot-notes appended to *Illinois Cent. R. Co. v. Keebler* (Ky.), 18 R. R. R. 32, 41 Am. & Eng. R. Cas., N. S., 32; foot-notes appended to *Kansas City, M. & B. R. Co. v. Thornhill* (Ala.), 14 R. R. R. 851, 37 Am. & Eng. R. Cas., N. S., 851; foot-notes appended to *Weed v. Chicago, etc., Ry. Co.* (Neb.), 13 R. R. R. 797, 36 Am. & Eng. R. Cas., N. S., 797.

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cause that would amount to allowing a person to reap the benefit from his own wrong; and so that is the principle underlying the doctrine of contributory negligence. Where a person is negligent, and his negligence results in injury to another person, yet if that other person is also negligent at the same time, and his negligence concurs with the negligence of the person whose negligence causes injury, and, concurring with it, contributes to the injury, so that it becomes a proximate and immediate or direct cause of the injury, so that he would not have been injured if he had not himself been negligent, although the other party may also have been negligent, under those circumstances the law will not allow him to recover damages for his injury, from the other party. So that is what is meant by the doctrine of contributory negligence, the defense of contributory negligence. * * *

"Negligence scarcely needs a definition. It means the failure of a person to exercise due care or prudence. The absence of due care is the briefest, as well as perhaps the clearest, definition of negligence. Expressed more fully, it is the failure of a person to do that which a person of ordinary prudence would do under the circumstances, or the doing of that which under similar circumstances a person of ordinary prudence would not do. It is either positive or negative; the doing of a careless thing or the failing to do a careful thing or a prudent thing. In this case, if the plaintiff suffered injury, and if his injury was caused solely by the negligence of the defendant in the particulars set out in the complaint in reference to the running of this train and the giving of orders, the directions of the conductor as the agent of the defendant, and the other particulars set out in the complaint; if he was injured by those acts of the defendant, and if those acts were the acts of the railroad company, which failed, under the circumstances of the situation, to exercise the care which an ordinarily prudent railroad company would exercise, then the plaintiff is entitled, if he suffered injury from that negligence, to be compensated for it. If the plaintiff was not injured by any negligence of the defendant, or the defendant was not negligent in the particulars alleged in the complaint, then the plaintiff is not entitled to recover from the defendant, although he may have suffered injury. Or, on the other hand, if his injury was caused solely by his own negligence, which is another contention of the defendant, then he is not entitled to recover damages from the defendant for his own fault. And, in like manner, if the defendant was negligent, if the railroad company was negligent in the particulars alleged in the complaint, and if plaintiff was also negligent in the particulars in which the defendant in his answers alleges, and his negligence, along with the negligence of the defendant, both combining together, caused the injury, and if the injury would not have been caused to him, even by the negligence of the defendant, unless he also had been negligent, and his negligence contributed as a direct or prox-

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mate cause of the injury, then that would make a case of contributory negligence, where the plaintiff would not be entitled to recover damages from the defendant. * * *

"Both the defendant and the plaintiff have requested me to charge you certain propositions of law, and, in so far as they are sound and applicable to the case, I will give them to you, and it is my pleasure to do so. They are given to you, of course, as much a part of the instructions of the court as anything else.

"First of all, on the part of the defendant, I am requested to charge you that, 'as a general rule, the conductor of a train is the representative of the master, the railroad company, and has control over the management of the train, and for his negligence the company is ordinarily responsible to an inferior servant injured thereby. This rule, however, does not apply where the company, by reasonable rules received by its employees and acted upon by them, has imposed a joint duty upon such conductor and such inferior servant, and the injury to the latter is caused by the concurrent negligence of both.' The first part of that proposition is a general rule of law, that is, that the conductor is in control of the train, and all of the other employees are subject to his directions, and that the company will be responsible for the injury to any of the other employees that results through the negligence of the conductor in giving orders, because the conductor is the immediate representative of the company itself, and orders from him are orders given by the company. If the company establishes a rule for its employees and acquaints them with the provisions of the rule, and that rule imposes upon the conductor and some other employee a joint duty, and they proceed in the discharge of that duty and are jointly negligent in the performance of the duty, as a matter of course, if one of them is injured he cannot recover because of the negligence of the conductor or the other party, provided his own negligence did contribute as a proximate cause of the injury, and that is the meaning of this instruction, and I so charge you. It is really a part of the general doctrine of contributory negligence.

"(2) 'If the jury believe from the evidence that the plaintiff, at the time of his alleged injury, was acting under the rules herein set forth, and that such rules are reasonable, I charge you that the plaintiff as engineman, and the conductor of his train were jointly responsible for the movement of his train, and the defendant is not responsible for damages inflicted upon him as the result of the joint and concurrent negligence of the plaintiff and his conductor.' And then it sets out the rules upon which the defendant relies for that instruction, to wit: 'Rule 204. Train orders must be addressed to those who are to execute them, naming the place at which each is to receive his copy. Those for a train must be addressed to the conductor and engineman, and also to any one who acts as his pilot. A copy for each person addressed must be supplied by the operator.' And then rule 502: 'They [enginemen] are jointly responsible with the con-

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ductor for the movement and protection of their trains in accordance with the rules; and while they must obey all proper orders by the conductor or others as provided by the rules, they are individually responsible for the observance of rules relative to their duties, and must decline to obey any order by the conductor or any other person which involves the violation of such rules, or peril to persons or property.' And special rule L: 'Conductors and enginemen are required to consult with each other and have a thorough understanding as to their meeting points.' Under those rules the responsibility still rests upon the conductor to give orders for the movement of the train and the management of the train, and while the rule does impose upon any other employee and especially the engineman, the duty to decline to obey an order which involves the violation of the rules, or which apparently or palpably exposes either persons or property to peril, still the rule entails or imposes upon the engineer the duty of obeying the orders of the conductor, where the orders are proper orders, by the very terms of the rule. So that, after all, it becomes a question for you to determine, if the question arises in this case, as to whether the engineer obeyed the order of the conductor and was negligent in obeying it. Then you must determine whether such an order or direction by the conductor was proper or not, because it is not competent for the court to charge you, as a matter of fact, whether an order by the conductor is proper or not. That is a matter of fact for you to determine, the court being prohibited from instructing you as to the facts. So that if you should find that the conductor gave to the engineer an order which was not a proper order, and which the engineer knew, or ought to have known under the circumstances, was not proper, and the engineer obeyed that order, and if you should conclude that such obedience of the conductor's orders amounted to negligence on the part of the engineer, and that that negligence caused his injury, or contributed to it as one of the direct or proximate causes, then that would amount to a case of contributory negligence, which would relieve the defendant of responsibility to the plaintiff for any injury he may have suffered. On the other hand, if you conclude the conductor gave proper orders, then the rule makes it the duty of the engineer to obey such orders, and if in pursuance of proper orders given by the conductor, the engineer, without any negligence on his part, proceeded and met with injury, and if you should conclude that the orders of the conductor—that the conductor himself was negligent, that negligence would be imputed to the defendant itself, and the defendant would be responsible to the plaintiff for any injurious consequences to the plaintiff from the giving of such orders by the conductor. Subject to those explanations, I charge you that proposition.

"(3) 'Even if the defendant was negligent, the plaintiff cannot recover damages if the injury was caused or contributed to any degree by his own negligence, combining and concurring

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with negligence of defendant and contributing therewith as a proximate cause of the injury.' That is merely another form of the doctrine of contributory negligence, which I have already explained, and I so charge you.

"(4) 'If the defendant had issued orders to the plaintiff, as engineman, concerning the movement of his train, and the plaintiff neglected such orders, and such neglect caused or contributed to the disaster, he is not entitled to damages.' That also is in accordance with the instructions already given you, that is, if the plaintiff caused his injury by his own negligence as the sole cause, of course, he cannot recover, or if he contributed to his injury by negligence on his part, which was the proximate cause of the injury, along with the negligence of the defendant, then that also would defeat his recovery, and I so charge you."

"On behalf of the plaintiff, I am requested to charge you:

"(2) 'That under the law of this state, the conductor, in the running of a train under his charge, is the representative of the railroad, and if the jury find from the testimony that the plaintiff was injured in the manner and by the means set out in the complaint, and that such injury was caused by the negligence of the conductor, then the plaintiff would be entitled to recover such damages as the jury find from the testimony he has sustained, provided the negligence of the conductor was the proximate cause of such injury.' I charge you that.

"(3) 'That by article 9, § 15, of the Constitution of this state, every employee of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporation, or its employees, as are allowed by law to other persons, not employees, when the injury results from the negligence of a superior agent or officer, or of a person having a right to control or direct the services of a party injured, and any contract or agreement, expressed or implied, made by any employee to waive the benefit of this section, shall be null and void, and in this case, if the jury finds from the testimony that the plaintiff was injured by the negligence of the conductor, then any implied agreement to release the company by working under a rule which provided that he was jointly responsible with the conductor, would be null and void under this section of the Constitution, and would not prevent his recovery.' I charge you that. * * *

"(6) 'That the plea of contributory negligence set up by the defendant in its answer herein, is an affirmative defense, and, therefore, under that plea, in order to excuse itself, the defendant must satisfy the jury by the preponderance of the testimony on that issue, that the negligence of the plaintiff contributed to the injury he suffered as a proximate cause thereof, without which the injury would not have occurred, and unless the defendant has so satisfied the jury, then they should find against the defendant on that plea.' I have specifically charged you that already, and so charge you. * * *

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“(10) ‘That a servant obeying the instructions of the representative of the master on the spot is not guilty of contributory negligence, although, if by such obedience, he disobeys a rule of the master.’ I charge you that.

“(11) ‘That the fact that the servant’s work is done in the presence and under the immediate direction of the master’s foreman, or the conductor in this case, is equivalent to the assurance by the master that the servant may safely proceed to the work required of him, and he is, therefore, not bound in such a case to search for danger. He may rely for safety upon the conduct of the conductor.’ I so charge you.

“(12) ‘That under rule 367 of the defendant company, the conductor is the man who is put in charge of the train, and every person employed thereon. They are made responsible for the safe and proper management of such trains, and for a thorough performance of the duty by the train employees, and for the observance and enforcement of all rules and orders relative thereto.’ That is the meaning of rule 367, and I so charge you. * * *

The jury retired, and returned with the request for further instructions from his honor.

“The Court: I understand that some of the jurors desire some further instruction, or rather that you desire some explanation as to the relationship, I might say, between the engineer and the conductor, as to what the authority of the conductor is. Rule 367, which I have not before me—perhaps you had better let that rule be read. This is the substance and meaning of rule 367 of the rules of the road governing all the employees—that under rule 367 of the defendant company, the conductor is the man who is put in charge of the train and every person employed thereon. They are made responsible for the safe and proper management of such trains and for the protection and care of passengers, baggage, and freight, for the thorough performance of duty by the train employees and for the observance and enforcement of all rules and orders relative thereto. That makes the conductor in effect what he is very often called in speaking of him, the captain, the head man of the train, and, of course, the other members of the train crew are subject to his orders. But here is rule 502, which presents some modifications of that rule 367: Enginemen are jointly responsible with the conductor for the movement and protection of their trains in accordance with the rules—one of which is 367.

“The Foreman of the Jury: Can I ask one question? Some of the jurors think that the conductor has authority, and that the engineer is compelled to obey his orders. They want to know, when the conductor says, ‘Pull out,’ is the engineer compelled to obey his orders?

“The Court: This is copied from the rule book: ‘They [enginemen] are jointly responsible with the conductor for the

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movement and protection of their trains in accordance with the rules, and while they must obey all proper orders by the conductor and others, as provided by the rules, they are individually responsible for the observance of rules relative to their duties, and must decline to obey any order by the conductor or any other person which involves a violation of such rules or peril to persons or property.' So, that, while the conductor is in control of the train, and it is the duty of the engineer to obey the orders of the conductor, still the rules themselves make it imperative on the engineer to decline or refuse the order of the conductor, if the order involves violation of the rules laid down for the engineer's own government, or peril to persons or property. I presume it would take a long time for you and me to read them all and find out whether there are rules there specially for the government of engineers and conductors and firemen, etc.; I presume that there are. If the conductor gives an order to the engineer that involves a violation of some rule laid down for the special government and guidance of the engineer, the engineer has the right and is commanded to refuse to obey, the rule being higher than the verbal order of the conductor. And then the engineer also is required to refuse to obey the order from the conductor, where it involves peril to persons or property. As a matter of course, a great deal must be left there to the perception and the judgment of the engineer as to whether an order does involve a violation of a rule that is laid down for the guidance of the engineer, or whether an order of the conductor involves peril to persons or property. Of course, if it does not apparently involve such peril, if the engineer knows that it does not involve peril of that kind, then it is his duty to obey the order; or if he does not know or has no good reason to believe it will involve any such peril, then he is bound to assume it does not, and it is his duty to obey the order, and he must obey it, under the rule. So, you see, a great deal must depend upon the engineer's own knowledge of the conditions surrounding him as to whether an order of the conductor will involve a violation of a rule of the company or peril to persons or property; a great deal must be left there to the knowledge of the engineer of the conditions surrounding him, and if an order from the conductor does involve a violation of the rules of the company, the engineer is required to refuse to obey; if it involves peril to persons or property, he is required to refuse to obey that order; unless it does either one or the other, then he is required to obey that order of the conductor.

"Of course, it is a question of fact here for you as to whether there was any order given by the conductor or not, and if so, whether that involved violation of the rules, which order the engineer would have the right to refuse to obey, or whether it involved peril to person or property apparent to the engineer. You do not have regard for the consequences in determining

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whether it did involve peril to life or property, but you have regard to the situation of the engineer at the time, and all the facts and circumstances in which he was acting, and if, in view of the conditions and circumstances in which he was at the time, if the conductor gave an order which involved peril to life or property, the engineer of course is required to refuse to obey that order; but if it did not, so far as the engineer could see, it was his duty to obey. * * *

Defendant appeals from judgment for plaintiff.

Exceptions:

“(1) Error of the presiding judge in charging the jury as follows: ‘Where a person is negligent, and his negligence results in injury to another person, yet if that other person is also negligent at the same time, and his negligence concurs with the negligence of the person whose negligence causes injury, and concurring with it, contributes to the injury, so that it becomes a proximate and immediate or direct cause of the injury, so that he would not have been injured if he had not himself been negligent, although the other party may also have been negligent; under those circumstances the law will not allow him to recover damages for his injury from the other party. So that is what is meant by the doctrine of contributory negligence, the defense of contributory negligence.’ Specification. This contains an erroneous qualification of the doctrine of contributory negligence, in that the defendant is required to prove that the plaintiff’s negligence was such that without it the injury would not have occurred. The defendant is absolved, if the plaintiff’s negligence be shown to have been a proximate cause concurring with the negligence of the defendant. Such negligence may have been a proximate cause without being the efficient cause; i. e., the cause without which the injury would not have occurred.

“(2) Error of the presiding judge in charging the jury as follows: ‘And in like manner, if the defendant was negligent, if the railroad company was negligent in the particulars alleged in the complaint, and if the plaintiff was also negligent in the particulars in which the defendant in his answer alleges, and his negligence, along with the negligence of the defendant, both combining together, caused the injury, and if the injury would not have been caused to him, even by the negligence of the defendant, unless he also had been negligent, and his negligence contributed as a direct or proximate cause of the injury, then that would make a case of contributory negligence, where the plaintiff would not be entitled to recover damages from the defendant.’ Specification: This contains an erroneous qualification of the doctrine of contributory negligence, in that the defendant is required to prove that the plaintiff’s negligence was such that without it the injury would not have occurred. The defendant is absolved, if the plaintiff’s negligence be shown to have been a proximate cause concurring

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with the negligence of the defendant. Such negligence may have been a proximate cause without being the efficient cause; i. e., the cause without which the injury would not have occurred.

“(3) Error of the presiding judge in charging the plaintiff’s sixth request to charge, which was as follows: ‘That the plea of contributory negligence set up by the defendant in its answer herein, is an affirmative defense, and, therefore, under that plea, in order to excuse itself, the defendant must satisfy the jury by the preponderance of the testimony on that issue, that the negligence of the plaintiff contributed to the injury he suffered as a proximate cause thereof, without which the injury would not have occurred, and unless the defendant has so satisfied the jury, then they should find against the defendant on that plea.’ Specification: This contains an erroneous qualification of the doctrine of contributory negligence; in that the defendant is required to prove that the plaintiff’s negligence was such that without it the injury would not have occurred. The defendant is absolved if the plaintiff’s negligence be shown to have been a proximate cause concurring with the negligence of the defendant. Such negligence may have been a proximate efficient cause without being the efficient cause; i. e., the cause without which the injury would not have occurred.

“(4) Error of the presiding judge in charging the jury as follows: ‘Under those rules (referring to the rules cited in the defendant’s second request to charge) the responsibility still rests upon the conductor to give orders for the movement of the train.’ Specification: Under said rules the conductor had nothing to do with giving orders for the movement of his train: such orders were train orders issued by another authority, the train dispatcher, to the conductor and engineer jointly, who were jointly responsible for their execution.

“(5) Error of the presiding judge in charging the plaintiff’s second request to charge, which was as follows: ‘That, under the law of this state, the conductor, in the running of a train under his charge, is the representative of the railroad, and if the jury find from the testimony that the plaintiff was injured in the manner and by the means set out in the complaint, and that such injury was caused by the negligence of the conductor, then the plaintiff would be entitled to recover such damages as the jury find from the testimony he has sustained, provided the negligence of the conductor was the proximate cause of such injury.’ Specifications: There was a testimony tending to show that in this particular case the conductor was not the representative of the railroad company in the running of the extra train upon which the plaintiff was engineer; on the contrary, that the movement of said train was under train orders, issued by the train dispatcher, directed to both the conductor and engineer, who, under the rules, were jointly responsible for their execution and the proper movement and protection of the

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train. It was error, therefore, to apply said principle to the facts of this case without appropriate modification. Even if the collision was due to the negligence of the conductor, the plaintiff himself was also negligent in permitting the conductor to overlook his orders.

“(6) Error of the presiding judge in charging the plaintiff's third request to charge, which was as follows: ‘That by article 9, § 15, of the Constitution of this state, every employee of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporation, or its employees, as are allowed by law to other persons, not employees,’ when the injury results from the negligence of a superior agent or officer, or of a person having a right to control or direct the services of a party injured, and any contract or agreement, expressed or implied, made by any employee to waive the benefit of this section shall be null and void; and in this case, if the jury finds from the testimony, that the plaintiff was injured by the negligence of the conductor, then any implied agreement to release the company by working under a rule which provided that he was jointly responsible with the conductor would be null and void under this section of the Constitution, and would not prevent his recovery.’ Specification: ‘The constitutional provision referred to has no application to the issues presented in this case nor to the evidence. The company had the right, notwithstanding the Constitution, to delegate the care, protection, and movement of the train jointly to the engineer and the conductor. If they allowed their train to collide with another train of the movements of which they were duly notified by train orders, they were both jointly responsible therefor.’ And even if the collision was due to the negligence of the conductor, the plaintiff himself was also negligent in allowing the conductor to overlook the orders. For this reason, there could have been no implied agreement by working under the rule to waive the benefit of said section; he would be answerable for his own negligence.

“(7) Error of the presiding judge in charging the plaintiff's tenth request to charge, which was as follows: ‘That a servant obeying the instructions of the representative of the master on the spot is not guilty of contributory negligence, although if by such obedience he disobeys a rule of the master.’ Specifications: (a) This is an erroneous proposition of law. (b) It has no application to the facts of this case, as under the rules the engineer as well as the conductor was charged with the duty of executing the orders for the movement of his train. (c) It eliminated the question of the plaintiff's duty, under rule 502, to decline to obey any order by the conductor, which involved the violation of the rules or peril to person or property, and of his contributory negligence in such regard. (d) It eliminated the question, under the rules, of the joint respon-

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sibility of the engineer and conductor for the movement and protection of their trains, and of the engineer's contributory negligence in such regard. (e) Whether, under a given state of facts, the plaintiff was or was not guilty of contributory negligence, is a question of fact for the jury and not for the court to decide.

"(8) Error of the presiding judge in charging the plaintiff's eleventh request to charge, which was as follows: 'That the fact that the servant's work is done in the presence and under the immediate direction of the master's foreman, or the conductor in this case, is equivalent to the assurance by the master that the servant may safely proceed to the work required of him, and he is, therefore, not bound in such a case to search for danger. He may rely for his safety upon the conduct of the conductor.' Specifications: (a) This is an erroneous proposition of law. (b) Whether a given state of facts constitutes contributory negligence or not, is a question for the jury and not for the court to decide; the charge was, therefore, violative of section 26, art. 5, of the Constitution. (c) It has no application to the facts of this case, as, under the rules, the engineer as well as the conductor was charged with the duty of executing the orders for the movement of the train. (d) It eliminated the question of the plaintiff's duty, under rule 502, to decline to obey any order by the conductor which involved the violation of the rules or peril to person or property, and of his contributory negligence in such regard. (e) It eliminated the question, under the rules, of the joint responsibility of the engineer and conductor for the movement and protection of their trains, and of the engineer's contributory negligence in such regard. (f) It excludes from the jury inquiry as to the manner in which the plaintiff may have done the work he was directed to do. (g) It relieves the plaintiff from the obligation to exercise ordinary care to avoid danger. (h) It erroneously declares that no matter what the conditions are, whether known to the conductor or not, whether known to the plaintiff or not, the plaintiff may blindly go ahead and do what he is told to do. (i) It destroys the defense of the plaintiff's contributory negligence, and of the sole negligence of the plaintiff."

T. P. Cothran, for appellant.

Wm. N. Graydon, for respondent.

POPE, C. J. This action of the plaintiff was to recover damages of the defendant because of personal injuries. The trial was heard before Judge Klugh and a jury. The verdict was for \$800 for the plaintiff. An appeal was taken. The history of the facts, or allegations of fact, in the pleadings and testimony was about as follows: The plaintiff had no knowledge or experience with the railroad track and the stations on defendant's railroad from Columbia, S. C., to Charlotte, N. C..

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and, when called upon by the railroad authorities to run the train known as No. 74 from Columbia to Charlotte, objected to doing so because of his want of knowledge of these things; but the defendant insisted that he would do so and agreed to place him in the hands of a pilot for said trip, which was done by placing over him Capt. Drake as such pilot, who was the conductor of said train known as No. 74. The difficulties of the trip over said railroad at that date were greatly increased by reason of an accident on another line of defendant's system of railroads, which necessitated many of defendant's trains being run on the railroad from Columbia to Charlotte and vice versa. The plaintiff, under the pilotage of Capt. Drake, who was conductor on train No. 74, started on his trip on the morning of June 8, 1903—having lost sleep during the nights of the 7th and 8th of June, 1903—and no accident occurred except that, on account of delays of his train, when he reached the station of White Oak, being more than 12 hours late, his train lost its class as No. 74, and became known as "extra 193." That when his train (extra 193) reached the station known as "Ft. Mill," he was held 25 or 30 minutes. That at Ft. Mill the station agent, who was also the telegraph operator, as plaintiff alleges, negligently and recklessly gave the plaintiff the signal to leave the station by showing him the "white board," and also negligently and recklessly gave him an order conferring on extra 193 the right of track over No. 73, which was not due to leave Charlotte for 50 minutes. That Charlotte was only 14 miles from Ft. Mill, and plaintiff had ample time to have gone there. That at that time said station agent knew, or ought to have known, that there was a passenger train coming from Charlotte and due to leave Pineville, the station above Ft. Mill, and between that place and Charlotte, and that a collision was inevitable. That when he was ordered to leave Ft. Mill, plaintiff had been on duty for more than 20 hours and was in no condition to run his engine. That the conductor, Drake, who had been ordered to pilot him, negligently and recklessly gave plaintiff orders to leave Ft. Mill, when he knew, or ought to have known, that the fourth section of No. 33 was coming and was bound to collide with extra 193. That acting upon the said orders and instructions from those who had a right to direct his services, the plaintiff being ignorant of the whereabouts of the passenger train and thinking that the track was clear, pulled out of Ft. Mill and collided with the passenger train before he got to Pineville, the next station. That seeing a collision inevitable, he jumped, broke his ankle, etc.

The defendant answered, denying the charges of negligence and recklessness, charging that the accident was due to the negligence of the plaintiff, and pleading the contributory negligence of the plaintiff, as follows: As a further defense, the defendant alleges that at or about 9 o'clock a. m. of June 8, 1903, the day upon which the collision occurred, the plaintiff

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while acting as engineer of extra 193, received from the defendant at White Oak, S. C., a written order that the fourth section of train No. 33, a train running in the opposite direction, would run 8 hours 20 minutes late; that the regular schedule leaving time at Charlotte of train No. 33 was 8:50 a. m., and the leaving time of said fourth section of 33 at Charlotte, according to said order, was 5:10 p. m.; that the regular schedule leaving time at Pineville of train No. 33 was 9:11 a. m., and the leaving time of said fourth 33 at Pineville, according to said order, was 5:31 p. m.; that the regular schedule leaving time at Ft. Mill of train No. 33 was 9:22 a. m., and leaving time of said fourth 33 at Ft. Mill, according to said order, was 5:42 p. m.; that said fourth 33 was 20 minutes late, and, leaving Charlotte at 5:30 p. m., it passed Pineville, without stopping, at 5:43 p. m., $6\frac{1}{2}$ miles north of Ft. Mill; that the plaintiff with his train, extra 193, arrived at Ft. Mill at 5:25 p. m., and left that station at 5:48 p. m., going in the direction of Pineville; that the plaintiff negligently, carelessly, and recklessly overlooked the order that he had received as aforesaid, notifying him of the movement of fourth 33, and in consequence collided "head on" with the said fourth 33 between Ft. Mill and Pineville, at or about 5:52 p. m.; that the plaintiff, when he left Ft. Mill, knew, or with the exercise or ordinary care should have known, that fourth 33 at that time was coming towards him between Pineville and Ft. Mill, and that a collision was inevitable; that by the rules of the company under which the plaintiff was working, he was jointly responsible with the conductor for the movement and protection of his train. "The defendant alleges that the aforesaid negligent acts and omissions of the plaintiff contributed to his injury in the manner stated, in conjunction with the alleged acts of negligence on the part of the defendant set forth in the complaint."

The plaintiff admitted that when he arrived at White Oak he passed three sections of No. 33, and that he knew that there was a fourth section to come, not only by the signals given and the whistles blown by those trains, indicating another section following, but by a written order handed to him by the agent at White Oak, reading as follows: "4th 33, engine unknown, will run 8 hrs. 20 m. late Charlotte to Winnsboro, and 8 hrs. late Winnsboro to Columbia."

Reference is made to the word "pilot." In the rules of defendant railway, a pilot is thus defined: "A person assigned to a train when the engineman or conductor, or both, are not fully acquainted with the physical characteristics, or running rules of the road or portions of the road, over which the train is to be moved." Rule 105: "Both conductors and enginemen are responsible for the safety and, under conditions not provided for by rules, must take every precaution for their protection." Rule 367: "They [conductors] will have charge of the trains to which

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they are assigned and of all persons employed thereon. They are responsible for the safe and proper management of such trains, for the protection and care of passengers, baggage, and freight, for a thorough performance of duty by the train employees, and for the observance and enforcement of all rules and orders relative thereto. * * * Rule 502: "They [engine-men] are jointly responsible with the conductor for the movement and protection of their trains in accordance with the rules; and while they must obey all proper orders by the conductors or others, as provided by the rules, they are individually responsible for the observance of rules relative to their duties, and must decline to obey any order by the conductor or any person which involves the violation of such rules or peril to person or property." Special rule 50: "Conductors and enginemen are required to consult with one another and have a thorough understanding as to the meeting points." "A train receiving this order is not required to protect itself against opposing extras unless directed by orders to do so, but must keep clear of all regular trains unless required by rule."

Let the report of this case contain the judge's charge and the exceptions thereto. We will now pass upon these exceptions.

1. The first three relate to an alleged failure of the circuit judge in his charge to the jury in regard to the defense of contributory negligence. An examination of the charge of the circuit judge will show it to be in exact accord with the definitions of this court of contributory negligence. The principles are announced in *Freer v. Cameron*, 4 Rich. Law, 232, 55 Am. Dec. 663; *Cooper v. Railway Co.*, 56 S. C. 91, 95, 34 S. E. 16. In this latter case this court said: "The best definition of contributory negligence we have seen is the following from 7 Ency. Law (2d Ed.) 371: 'Contributory negligence is a want of ordinary care upon the part of a person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred.'" It is thus seen that contributory negligence by plaintiff can never exist except when the injury has resulted from the negligence of the defendant as a "concurring proximate cause." In *Bowen v. Railway Co.*, 58 S. C. 228, 36 S. E. 590, this exact definition has been adopted by the Court. In *Easler v. Railway Co.*, 59 S. C. 322, 37 S. E. 941, where the definition in the two previous cases of *Cooper* and *Bowen* was adopted, Chief Justice McIver remarked as follows: "From this as well as what is said in *Farley v. Basket and Veneer Co.*, 51 S. C. 237, 28 S. E. 193, and in *Disher v. Railway Co.*, 55 S. C. 192, 193, 33 S. E. 172, it is apparent that the definition of contributory negligence can only arise when the injury complained of is the compound result of both plaintiff and defendant, both contributing to such result by their combined and concurrent action as a proximate cause of the injury. Hence, as is said by the late Judge McGowan, in

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Simms v. Railway Co., 26 S. C. 497, 2 S. E. 490, 'Until a prima facie case of negligence is made out against the defendant there can be no such question as that of contributory negligence on the part of the plaintiff.' " In the notes of the 7th Ency. of Law, 372, 373, in discussing the subject of contributory negligence, the learned author lays down the principles in exact accord with our definition. In notes, page 373, in the American and English Ency., the author well quotes from the annotator of the American Decisions: "Scarcely any theme in the whole range of legal science has been more fruitful in adjudications than the subject of contributory negligence; but the multiplicity of decisions on this point has not by any means cleared it of difficulties. On the contrary, it has in some respects seemed rather to 'darken counsel' by the introduction of a great variety of metaphysical refinements and subtle distinctions." If contributory negligence is made clear by the circuit judge, too many refinements had better be obviated by him. It seems to us that where a definition is broad and true that it is better to adhere to the same rather than to follow the suggestions overly refined. We, therefore, overrule these exceptions.

2. Exception 4. It must always be remembered that it is a concrete case and not an abstract one that is under consideration on appeal. Under the rules of the defendant company, when the plaintiff objected to taking No. 74 out of Columbia because he was unacquainted with said division, and had never worked on it, did not know the road and did not care to go out over that division, the master mechanic told the plaintiff that the conductor, Mr. Drake, would pilot the plaintiff over said road, and that Mr. Drake told him of his directions to act as pilot. An observation of the rules of the defendant road shows that the engineman, along with the conductor are responsible for the safety of their train. See rule 105 and also rule 368, which hold that conductors and enginemen are jointly responsible. While rule 367 provides that conductors will have charge of the trains to which they are assigned, and of all persons employed therein, they are responsible for the safe and proper management of such trains, for the protection and care of passengers, baggage, and freight, for a thorough performance of duty by the train employees, and for the observance and enforcement of all rules and orders relative thereto. When these rules are considered, including the appointment of the conductor as pilot, it will be seen that the circuit judge did not err here as complained of. The train cannot move ordinarily without the order of the conductor, and, therefore, orders issued by another department of the railroad cannot supersede the authority given under these rules, to the conductor. This exception is overruled.

3. Exception 5. The conductor is to a certain extent the master of the railroad train, and when injury is produced by his negligence in carrying out the purposes of his appointment, the defendant railroad is responsible therefor. This exception is overruled.

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4. Exception 6. Error was assigned because the circuit judge charged plaintiff's third request. We think there was no error here. This exception is overruled.

5. Exception 7. When the circuit judge charged the tenth request of the plaintiff, "That a servant obeying the instructions of the representatives of the master on the spot is not guilty of contributory negligence in so obeying said master," he committed no error. *Carson v. Railway Co.*, 68 S. C. 55, 46 S. E. 525. This exception is overruled.

Exception 8. The error assigned to the circuit judge is in charging plaintiff's eleventh request: "That the fact that the servant's work is done in the presence and under the immediate direction of the master's foreman, or conductor in this case, is equivalent to the assurance by the master that the servant may safely proceed to the work required of him," etc. This was not error. See *Carson v. Railway*, 68 S. C. 55, 46 S. E. 525. This exception is overruled.

It is the judgment of this court that the judgment of the circuit court be, and it is, hereby affirmed.

MAEHREN v. GREAT NORTHERN RY. CO.

(Supreme Court of Minnesota, June 22, 1906.)

[107 N. W. Rep. 951.]

Master and Servant—Injuries to Servant—Negligence.*—Action to recover for personal injuries sustained by a locomotive engineer by a rear end collision between two freight trains of the defendant. Defense that the plaintiff was guilty of contributory negligence in not complying with a rule requiring all trains to approach all stations and water tanks under control. Held, if compliance by the servant with a general rule is rendered impossible by other and inconsistent orders and duties imposed by the master, negligence cannot be imputed to the servant for not following the general rule.

Same—Contributory Negligence.*—If the plaintiff had his train under control as he approached the station, or if he did not, if he used due care and, under the circumstances of the case, did all that it was reasonably possible for him to do, consistent with other rules and duties, if any, imposed upon him by the defendant, to comply with the rule as to having his train under control he would not be guilty of contributory negligence, otherwise he would be.

Same.—It was error for the trial court to instruct the jury to the effect that if the plaintiff exercised the care and diligence to keep his

*For the authorities in this series on the subject of contributory negligence and assumption of risks by employees where they fail to comply with master's rules and regulations, see foot-notes appended to *Baltimore & O. R. Co. v. Doty* (C. C. A.), 17 R. R. R. 753, 40 Am. & Eng. R. Cas., N. S., 753; foot-notes appended to *Illinois Cent. R. Co. v. Stith's Adm'x* (Ky.), 16 R. R. R. 729, 39 Am. & Eng. R. Cas., N. S., 729; foot-notes appended to *Moore v. St. Louis, etc. Ry. Co.* (La.), 16 R. R. R. 370, 39 Am. & Eng. R. Cas., N. S., 370; *Demko v. Carbon Hill Coal Co.* (C. C. A.), 16 R. R. R. 232, 39 Am. & Eng. R. Cas., N. S., 232.

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train under control ordinarily exercised by engineers under like circumstances he was not guilty of contributory negligence.

Same—Question for Jury.—The evidence in this case was sufficient to take the case to the jury upon the question of the alleged contributory negligence of the plaintiff in not complying with the rule.

(Syllabus by the Court.)

Appeal from District Court, Stearns County; D. B. Searle, Judge.

Action by Casper Maehren against the Great Northern Railway Company. Verdict for plaintiff, and from an order denying a motion for judgment or for a new trial, defendant appeals. Reversed, and new trial granted.

M. L. Countryman and Geo. H. Reynolds, for appellant.

Calhoun & Bennett and Donohue & Stevens, for respondent.

START, C. J. Action to recover damages for personal injuries sustained by the plaintiff by a rear-end collision between two freight trains of the defendant at Osakis, this state, on September 27, 1904. Verdict for the plaintiff for \$5,000. The defendant appealed from an order denying its alternative motion for judgment or for a new trial. That the plaintiff was injured to some extent by the collision, and that it was caused by the negligence of the defendant's servants in charge of the head train, is not controverted.

1. It is, however, the contention of the defendant that the evidence establishes the contributory negligence of the plaintiff as a matter of law, in that he violated rule 53 of the defendant which provided that: "All trains must approach all stations and water tanks between stations under control, and so proceed until the track is plainly seen to be clear. The responsibility for a collision at a station, or at a water tank between stations, will rest with the following or incoming train. This will not relieve train and engine men from responsibility of protecting trains at stations and water tanks as provided by rules 49 and 57"; that is, by sending a flagman back a sufficient distance to warn other trains by the use of flags, torpedoes, or other signals. Evidence was offered on the trial tending to establish the following facts: That the plaintiff was a locomotive engineer, and on September 27, 1904, at 2:25 o'clock a. m. he left Barnesville for Melrose, this state, in charge of a live stock train of 28 cars. The time schedule of his train to Evansville, and of a similar train preceding his own, was delivered to him. These particular trains had the right of way over all trains, except passenger trains, from Barnesville to Evansville, a distance of 56 miles. The plaintiff reached Evansville one-half hour behind schedule time. Here he received an order fixing his time schedule to Melrose, the end of his run, with an admonition from the defendant's superintendent to the effect that he did not make good time to Evansville, and to try and reach Melrose on time. No time

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schedule of the head train from Evansville to Melrose was given to him. He also had an order directing him to run not exceeding 10 to 12 miles between switches at Osakis. He reached a point $1\frac{3}{4}$ miles west of Osakis at 5:58 o'clock a. m. The morning was dark and foggy, and his rails slippery. At a point $1\frac{1}{2}$ miles west of Osakis he shut off steam, applied the brakes and reduced the speed of the train to 16 or 18 miles an hour, and at a point one-half mile west of Osakis the speed was reduced to 8 or 10 miles an hour. It was downgrade and he sat looking ahead with his hand on the brake which was set. The speed was 8 to 10 miles an hour. The head train was delayed by a hot box, and stopped 75 feet west of the first switch without sending back a man to warn, by flags, torpedoes, or other signals, other trains, as was the duty of those in charge of the head train. The collision occurred 75 feet west of the first switch, not between the switches. The water tank was some 900 feet east of that point. The plaintiff at the rate he was running could have stopped it in 400 feet, but, owing to the fog, he could not see that distance. When he saw the caboose of the head train on the track it was too late to avoid the collision, and he let go of the brake, pulled the whistle rope, jumped off his engine, and was injured. He testified to the effect that, if the flagman or danger signal had been placed 150 feet back of the rear of the head train, he would have avoided the collision. The statements of the plaintiff made to the superintendent after the accident, differed in some material particulars from his testimony on the trial. The credibility of his testimony was for the jury, and his testimony tended to establish the facts we have stated. It is clear that the plaintiff did not have his train under such control, at the time of the collision, that he could have stopped it within a distance covered by the range of his vision.

It is the contention of the defendant that it was the plaintiff's absolute duty so to have his train under control that he could have stopped it within a distance limited by his range of vision, and that, failing so to do, he was guilty of contributory negligence as a matter of law. It is to be noted that rule 53 requires that all trains must approach all stations and water tanks under control and so proceed until the track is plainly seen to be clear, that it does not command the doing or not doing of any particular specific act, but that it is one calling for the exercise of judgment and diligence on the part of the engineer, and further that it must be considered in connection with other rules, and other duties, if any, imposed upon him by the defendant. This case is to be distinguished from those cited by the counsel for the defendant which involved rules which were absolute in their terms and commanded the doing of a particular act, such as testing the brakes, or inspecting some part of the train. See *Nordquist v. Railway Co.*, 89 Minn. 485, 95 N. W. 322 and *Scott v. Railway Co.*, 90 Minn. 135, 95 N. W.

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892. In principle the case at bar is not essentially different from the case of *Hall v. Railway Co.*, 46 Minn. 439, 49 N. W. 239. The rule in that case somewhat differed in its terms from the rule here in question, but it was quite as absolute and mandatory as to the duty of engineers to have their trains under control when approaching and passing stations as is the rule in this case. In that case the court refused to give a requested instruction to the effect that it was the engineer's duty, while running through the yard and approaching the switches, to have his train under complete control so that he could stop it within the distance covered by his range of vision, and, failing to do so, would be guilty of contributory negligence. The refusal to give the instruction was held to be correct on appeal to this court, which held that the rule must receive a reasonable construction, and that the duty of the engineer under the rule must be determined in each particular case with reference to its facts and other rules and duties imposed upon him by the railway company. And further, that if compliance by a servant with a general rule is rendered impossible by other and inconsistent orders or duties given or imposed by the master, negligence cannot be imputed to the servant for not following the general rule. The evidence in this case tending to show the time and place and circumstances of the collision, the time schedules given to the plaintiff by which to run his train, the admonition of the superintendent, and the order limiting the running time between switches at Osakis was sufficient to take the case to the jury upon the question of the plaintiff's alleged contributory negligence. We do not discuss the evidence, as there must be a new trial ordered upon another ground. It follows that the defendant's motion for judgment absolute was correctly denied.

2. The trial court, at the request of the defendant, correctly instructed the jury as to the duty of the plaintiff to obey the rule, and the effect upon his right to recover in case he disobeyed it. But in the general charge the jury were instructed, that, if the plaintiff had control of his train at the time in question, or failing to have control of it, he exercised that care and diligence at the time to have or keep such control as is ordinarily exercised by engineers under like circumstances and conditions, then he would not be guilty of contributory negligence. This was error, for the instruction was to the effect, that if plaintiff exercised the care and diligence to keep his train under control ordinarily exercised by engineers under like circumstances and conditions then he would not be guilty of contributory negligence. The importance and necessity of complying with the rule in question must not be minimized, for the safety of human lives and limbs depends upon such compliance. The jury should have been instructed to the effect that if the plaintiff had his train under control as he approached the station, or if he did not, if he used due care, and, under the circumstances of the case as disclosed by the evidence, did

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all that was reasonably possible for him to do, consistent with the other rules and duties imposed upon him by the defendant, to comply with the rule as to having his train under control. he was not guilty of contributory negligence; otherwise, he was so guilty. Or, in other words, the question for the jury was, did the plaintiff, under all the circumstances disclosed by the evidence, exercise due care—that is, ordinary care—to comply with the rule? If he did, he was not guilty of contributory negligence. If he did not, he was so guilty. It is urged by plaintiff's counsel that the error was not a reversible one, for the reason that the charge taken as a whole was correct. It is the rule of this court not to reverse for errors in the charge of the trial court to the jury when it fairly appears from the charge as a whole that the jury were properly instructed and could not have been misled by any technical errors. However, the difficulty in this case is that the error was fundamental, and was repeated several times; hence it was manifestly reversible error.

3. The defendant also urges that the damages awarded are excessive. We have not considered this question, and we are not to be understood as approving or criticising the verdict in this respect. It is unnecessary to do either in view of the fact that there is to be a new trial.

Order appealed from reversed, and a new trial granted.

CONINE v. OLYMPIA LOGGING CO.

(Supreme Court of Washington, Feb. 28, 1906.)

[84 Pac. Rep. 407.]

Master and Servant—Injury to Servant—Negligence—Question for Jury.*—In an action for injuries to a servant owing to the starting of a logging engine without warning him, held, that the question whether the whistle on the engine provided for the purpose of giving warning of the starting of the engine was a sufficient protection to plaintiff, was one for the jury.

Same—Fellow Servants—Negligence Concurring with That of Master.†—A master is liable for injuries to a servant owing to his negligence concurring with that of a fellow servant.

*For the decisions in this series on the subject of logging railroads, see foot-note appended to *McKivergan v. Alexander & Edgar Lumber Co.* (Wis.), 15 R. R. R. 372, 38 Am. & Eng. R. Cas., N. S., 372; foot-notes appended to *Demko v. Carbon Hill Coal Co.* (C. C. A.), 16 R. R. R. 232, 39 Am. & Eng. R. Cas., N. S., 232; foot-notes appended to *Fuller v. Tremont Lumber Co.* (La.), 17 R. R. R. 710, 40 Am. & Eng. R. Cas., N. S., 710; foot-notes appended to *Cole v. St. Louis Transit Co.* (Mo.), 17 R. R. R. 583, 40 Am. & Eng. R. Cas., N. S., 583; foot-note appended to *Gila Valley, etc., Ry. Co. v. Lyon* (Ariz.), 16 R. R. R. 745, 39 Am. & Eng. R. Cas., N. S., 745; foot-notes appended to *Virginia & S. W. Ry. Co. v. Bailey* (Va.), 15 R. R. R. 795, 38 Am. & Eng. R. Cas., N. S., 795.

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Trial—Motion for Nonsuit—Waiver.—Where defendant after the overruling of a motion for a nonsuit proceeded to introduce evidence in his own behalf he waived his right to stand upon the motion.

Fullerton, J., dissenting.

Appeal from Superior Court, Thurston County; O. V. Linn, Judge.

Action by Cloyce D. Conine against the Olympia Logging Company. From a judgment for plaintiff, defendant appeals. Affirmed.

G. C. Israel, for appellant.

Phil Skillman and *J. W. Robinson*, for respondent.

HADLEY, J. This cause was once before appealed to this court, and was reported in 36 Wash. 345, 78 Pac. 932. The former appeal was determined upon demurrer to the complaint, and for a statement of the averments of the complaint we refer to the former opinion. The trial court had sustained the demurrer, on the ground that no negligence was charged to the defendant, and that the negligence shown was that of a fellow servant. This court was, however, of the opinion that as against demurrer, the complaint, because of the particular situation, did charge actionable negligence against defendant, in that it was charged that defendant negligently failed to provide an appliance by which the engineer could signal the man at the logs that he was about to start his engine for the purpose of moving the logs, by means of which the man at the logs would be enabled to protect himself against injury. Accordingly, the judgment was reversed, and the cause remanded, with instructions to overrule the demurrer. The defendant afterwards answered and denied the allegations as to negligence. The answer also alleges that the injury was due to plaintiff's contributory negligence, together with the negligence of a fellow servant. The cause was tried before a jury, and a verdict was returned in favor of plaintiff for the sum of \$2,000, for which amount judgment was entered, and the defendant has appealed.

It is assigned that the court erred in denying appellant's motion for nonsuit. It is contended that the proof showed that appellant was not negligent in the particular wherein it was held that the complaint charged negligence; but that it appeared that means for signaling from the engine to the man at the logs were provided. The testimony discloses the environment of respondent much as described in the complaint. His situation at the logs was about 60 rods from what was called the "road" engine. This engine was stationed at the side of the railroad track, and was operated to draw the logs from the place where respondent connected them with a cable attachment. They were drawn down to the railroad in this manner for the purpose of being loaded upon the cars. Respondent's location was up a hill from that of the engineer at the road engine, and the hill and trees intervened so that one

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could not see from one location to the other. Close to the place where respondent was required to attach the logs was stationed another engine, called the "yard" engine. This was used to draw the logs by means of another cable extending back into the woods to points where the logs were cut. When thus drawn out to a point near this engine, it was respondent's duty to attach them to the cable connected with the road engine, for the purpose aforesaid. A wire rope extended from near respondent's location to the road engine, which was attached to the whistle of the latter engine. It was provided in order that respondent might by pulling it sound the whistle of the road engine, and thus signal the engineer that the logs were attached and ready to be drawn. The engineer was not expected to start the engine until he received such a signal, which by rule was to be one sound of the whistle. There was no appliance extending from the road engine to respondent's location, whereby the engineer could sound a signal near respondent that the engine was about to be started. The signaling means which appellant contends it did provide were that the engineer should give one sound of the whistle at the engine as a notification to respondent that the engine was about to start for the purpose of pulling the logs. This signal was not to be given and the engine was not to be started until respondent had first given the signal indicating that all was in readiness. It will be observed that the place where appellant contends it provided a signal to be sounded for respondent's protection, was 60 rods distant from him, with a hill and trees intervening between him and the place. Moreover, in close proximity to the respondent was the yard engine, which, the evidence shows, was in operation at the time of the accident. It was also shown that the running of this engine and the operation of its cable attachment made much noise. Taking into account all these surroundings, it became a serious question whether respondent, even by the exercise of reasonable care, could at all times hear the signal sounded beyond the trees and down the hill at the road engine, 60 rods away. He says he gave no signal for starting the engine, and that he heard none that it was about to be started. We said in the former opinion that if signaling means had been provided, whereby the engineer could have signaled respondent that the engine was about to start when it did, respondent might thereby have been warned of his danger, and thus enabled to protect himself from injury. It is true, the complaint alleged that no signaling device was provided for that purpose; but if the proof showed that appellant relied upon its engine whistle 60 rods distant from respondent, as furnishing the means for such signal, and that it was insufficient under the surroundings for reasonably safe reliance, then sufficient negligence was shown for the consideration of the jury. The intendment of the averment of the complaint that no means were provided for the engineer to sound a signal at respondent's location was fully shown by respondent's proofs, and if some other means re-

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lied upon by appellant to effect such signal purposes did appear in the evidence, it became a question for the jury whether the appliance was sufficient under all the circumstances.

For reasons stated in the former opinion, we think that under the testimony introduced by respondent the court should not have held as a matter of law, upon the motion for nonsuit, that the cause came within the fellow-servant rule which exempts the master from liability. In the discharge of their particular duties, the two employees were necessarily so situated remote from each other that adequate means of communication from the engineer to respondent were necessary in order that respondent might assuredly receive warning of danger from the movement of logs about to be made. With such adequate warning means provided, respondent might, as a result thereof, have been enabled to so control his situation as to escape injury. For appellant to have been held free of negligence in the premises as a matter of law, it must have clearly appeared that it had provided the two employees, situated as they were with reference to each other, with sufficient communicating facilities for exercising such immediate influence over each other as was necessary to enable them to reasonably control the situation with respect to safety. In other words, it must have clearly appeared that a safe place was provided by appellant for respondent to do the work he was assigned to do; that his injury was in no sense due to appellant's neglect in that regard, but was wholly due to the neglect of a fellow servant, before the court would have been justified in withholding the case from the jury on the ground that the injury was the result of a fellow servant's negligence. We think that the motion for nonsuit was properly denied.

In any event, whatever may have been the evidence at that time, appellant did not stand upon its motion for nonsuit, but proceeded to introduce evidence in its own behalf. Having thus waived its right to stand upon the motion for nonsuit, it then became necessary to consider the case upon the whole evidence introduced by both parties. *Port Townsend v. Lewis*, 34 Wash. 413, 75 Pac. 982; *Elmendorf v. Golden*, 37 Wash. 664, 80 Pac. 264. Appellant introduced evidence that the engineer did sound the whistle signal before starting. Under appellant's theory and evidence, there was therefore no neglect of the fellow servant by way of failing to use the signaling means provided. If, therefore, there was neglect of the fellow servant, it consisted in starting the engine without first receiving a signal from respondent. Respondent says that he heard no starting signal. If, therefore, the starting signal device was insufficient to meet the exigencies of respondent's situation, there was negligence of the master concurring with that of the fellow servant. In such a case, the master is not excused. *Costa v. Pacific Coast Company*, 26 Wash. 138, 66 Pac. 398; *Brabon v. Seattle*, 29 Wash. 6, 69 Pac. 365. See, also, authorities cited in those opinions.

Appellant assigns as error the refusal of the court to give cer-

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tain instructions. We think, however, that the instructions given fairly and fully, submitted the case to the jury within our views as above set forth, and also in the former opinion. We believe appellant's requests for proper instructions were sufficiently covered by those given, and that its rights were not prejudiced by the refusal to instruct in the exact form requested.

No questions being raised as to the extent of respondent's injury, the amount of damages awarded, or as to the introduction of evidence at the trial, the judgment is therefore affirmed.

MOUNT, C. J., and DUNBAR, J., concur. FULLERTON, J., dissents.

CROW and ROOT, JJ. By reason of the rulings heretofore announced in *Conine v. Olympia Logging Company*, 36 Wash. 345, 78 Pac. 932, which have become the law of this case, we concur in the result.

STEWART v. RALEIGH & A. AIR LINE R. Co. et al.

(Supreme Court of North Carolina, May 1, 1906.)

[53 S. E. Rep. 877.]

Evidence—Experts—Railroad Rules—Explanation.*—In an action for death of a railroad engineer in a collision, it was proper to refuse to permit an expert train dispatcher to explain the effect of various rules of the railroad company, which were couched in language of ordinary meaning and significance.

Master and Servant—Death of Servant—Railroads—Collision—Action—Evidence.—Where, as a matter of law, deceased was running his engine, at the time he was killed in a collision, on telegraphic orders in connection with defendants' rules, and defendants were permitted to introduce all their orders and rules of which deceased had notice, it was not error for the court to refuse to permit the train dispatcher to answer whether the engine which deceased was running at the time was operating solely under telegraphic orders.

Same.—In an action for death of an engineer in a collision, defendants' time-table, and the train sheets of the day on which the collision occurred, were admissible to show the movements of the trains on that day.

Trial—Purpose of Evidence—Limitation—Request.—Where evidence was admissible for a particular purpose, it was defendants' duty to request an instruction restricting the jury's consideration thereof to such purpose, if it desired such restriction.

Evidence—Experts—Subjects of Expert Testimony.*—In an action for death of a railroad engineer in a collision between a light engine and a train, what constituted a train crew generally and what was a proper train crew for a light engine were proper subjects for expert testimony.

Master and Servant—Death of Servant—Negligence—Res Insa Loquitur.†—A collision between a freight train and a light engine

*For the authorities in this series on the question of the admissibility of expert testimony and opinion evidence, see foot-notes appended to *Louisville & N. R. Co. v. Molloy's Adm'x* (Ky.), 18 R. R. R. 714, 41 Am. & Eng. R. Cas., N. S., 714.

†For the authorities in this series on the question whether a pre-

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in the daytime, resulting in the death of an engineer, is sufficient to raise a presumption of negligence on the part of the railroad company.

Same—Questions for Jury.—In an action for death of an engineer, caused by a collision between a light engine and a freight train, resulting from a failure to notify the operatives of the engine of the whereabouts of the freight train, evidence as to defendant's negligence and deceased's contributory negligence in operating the engine held to require submission of such questions to the jury.

Same—Instructions—Modification.—Where, in an action for death of an engineer in a collision, there was sufficient evidence to show that the block system increased safety and decreased the danger of collision, an instruction that if the system of moving trains on defendant's road at the time of the injury was reasonably safe and one in general use on railroads in the United States, defendant was not negligent in failing to provide a safe system, was properly modified by adding the words "unless the jury further find that the block system was a safer system and was in general use by railroad in the United States of like character" to that operated by defendant.

Same—Telegraph Stations—Duty to Maintain.—A railroad company is only bound to establish such telegraph stations along its line as are necessary for the proper running of its trains, with regard to the safety of its employees and passengers.

Same—Instructions—Modification.—In an action for death of an engineer in a railroad collision, a requested instruction that if defendant's rules permitted the running of an engine and tender with a crew of only an engineer and fireman, and such was the standard rule of the American Association of Railways, defendant was not negligent in that respect, was properly modified by adding a clause requiring that the running of an engine with such a crew as on such a trip as the one in question was reasonably safe, etc.

Same—Question for Jury.—Where, in an action for death of an engineer in a railroad collision, negligence was claimed in that defendant had failed to install the block system and witnesses had testified that such system diminished the danger of collision, tended to give one train exclusive use of the track between certain points, and was an additional safeguard, whether defendant's failure to install such system was negligence was for the jury.

Same—Trial—Misleading Instructions.—In an action for death of an engineer in a railroad collision, the court modified a requested instruction that, if defendant's system of signals and rules were the same as those in general use at the time of the collision, then defendant was not guilty of negligence in failing to adopt another system, etc., by adding a clause, "unless such system is safer or most approved, and in general use in the United States by railroads of like character as the defendant." Held, that such modification was not objectionable as misleading the jury to believe that defendant was bound to provide the most approved appliances.

Same—Contributory Negligence.—Where, in an action for death of a railroad engineer in a collision, a witness testified that on seeing deceased's engine and another train approaching on a single track, witness endeavored to signal deceased to stop, but that deceased paid no attention to him, an instruction that if deceased saw witness, or by the exercise of ordinary care could have seen him, wave his hat, it was deceased's duty to have stopped his engine, and, if such

sumption of negligence on the part of the master or his representative arises from the fact that one of his servants is injured, see footnotes appended to *Choctaw, O. & G. Ry. Co. v. Doughty* (Ark.), 18 R. R. R. 665, 41 Am. & Eng. R. Cas., N. S., 665; *Looney v. Metropolitan R., etc., Co.* (U. S.), 18 R. R. R. 617, 41 Am. & Eng. R. Cas., N. S., 617.

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violation was the proximate cause of his injury, deceased was guilty of contributory negligence, was proper.

Same—Burden of Proof.‡—Where a railroad engineer was killed in a collision, the burden was on defendant to remove the presumption that deceased exercised due care for his own safety and was not guilty of contributory negligence.

Appeal from Superior Court, Wake County; Cooke, Judge.

Action by Mary A. Stewart, as administratrix, etc., against the Raleigh & Augusta Air Line Railroad Company and the Seaboard Air Line Railway Company. From a judgment for plaintiff, defendants appeal. Affirmed.

See 50 S. E. 312.

Action by plaintiff to recover damages for the death of her intestate by reason of alleged negligence of defendant. There was evidence tending to show: That plaintiff's intestate was on June 23, 1903, in the employment of defendant as locomotive engineer; had run train No. 6 on the main line. He was given a copy of defendant's book of rules and stood an examination as required by the company, which was put in evidence. At 5:57 o'clock a. m. of June 23, 1903, he received a telegraphic order from the proper authority in the following words: "To Conductor and Engineman of Engine 200: Engine 200 will run extra Johnson Street to Aberdeen, speed 20 miles per hour. A. W. T." He left Johnston Street station at 6:10 a. m. on engine No. 200, tender attached, with fireman, traveling southward. Defendant on that day was operating over its road between Raleigh and Hamlet, including Aberdeen, moving northward, the following trains, to wit: No. 66, a first-class train, schedule time leaving Hamlet 8:55 a. m., and Southern Pines 9:45; then to pass No. 6, a third-class local freight; Manly 9:48; Vass 9:58. No. 38, first-class mail, leaving Hamlet 7:50; Southern Pines 8:45; Vass 9:04; Cameron 9:14. No. 8, a second-class vegetable express, leaving Hamlet 7:00; Aberdeen 8:15; then to pass No. 6, Southern Pines 8:25; Vass 8:45. No. 6, a third-class local freight, leaving Hamlet 6:10; arriving Aberdeen 8:15, leaving Aberdeen 9:10, and is passed there by No. 8 and 38; Southern Pines 9:45, and is passed there by No. 66; Manly 10:05; Vass 10:25. The foregoing is the schedule put in evidence for the several trains moving northward between Raleigh and Hamlet, between 6:10 and 12 m. All of these trains were regular, run by time-table, and are known by number. No. 200 was an extra, and run by telegraphic orders. At Sanford the engineer on No.

‡For the authorities in this series on the question whether there is a presumption of due care on the part of a person killed by a train or car, see foot-notes appended to *Ryan v. St. Louis Transit Co. (Mo.)*, 18 R. R. R. 775, 41 Am. & Eng. R. Cas., N. S., 775; *Gorham v. Milford, etc., Ry. Co. (Mass.)*, 18 R. R. R. 745, 41 Am. & Eng. R. Cas., N. S., 745; *Looney v. Metropolitan R., etc., Co. (U. S.)*, 18 R. R. R. 617, 41 Am. & Eng. R. Cas., N. S., 617; foot-note appended to *Donaldson v. New York, etc., R. Co. (Mass.)*, 18 R. R. R. 424, 41 Am. & Eng. R. Cas., N. S., 424.

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200 received at 8:33 a. m. the following order: "To Engineman and Conductor, Extra 200 South: No. 8, engine 659, will wait at Vass until 10 a. m. for extra 200 south." Also: "No. 66, engine unknown, will run 40 minutes late Hamlet to Sanford, and 30 minutes late Sanford to Johnston Street." No other orders were given No. 200. Time-table June 23, 1903, was introduced by defendant and showed the movement of trains: "Extra 200 left Johnston Street Station 6:10 a. m., arrived at Sanford 8:33, Cameron 9:10, left 9:21, arrived at Vass 9:38, left 10:02." No. 6 left Hamlet 7 a. m., arrived at Aberdeen 8:18, left 9:33, arrived Southern Pines 9:47, left at 10. No. 8 left Southern Pines 9:42, arrived at Vass 9:59, and passed extra 200. The conductor of No. 6 received at Aberdeen the order in regard to moving of No. 66, same as received by No. 200. No meeting place was made for No. 6 and No. 200 extra. F. W. Taylor, defendant's operator at Vass, testified: That Stewart, the plaintiff's intestate, came into his office and asked if he could not get more time on No. 8. That he wired dispatcher asking for more time on No. 8 for 200 extra. He answered that No. 8 would be there in a few minutes, and that it passed Vass at 9:59. As Stewart was going out of the door of his office, the witness asked him how much time he had on No. 66, and he replied that he had 40 minutes on 66, and was going to try to make Southern Pines. The witness did not remember that any thing was said about No. 6. He left at 10:02. The witness reported to train dispatcher, who wired him to go out and see if Stewart was gone, and he had gone. The witness reported to dispatcher, who told him to try to get Niagra or Manly over the telephone, which he did, but failed. There was a private telephone at both places. The witness was unaware of the movement of trains, except what Stewart told him. He put out white board of semaphore when Stewart left Vass, which signifies safety and is a signal to go on. C. W. Jones, the defendant's operator at Southern Pines, testified: That No. 6 left there at 10 a. m., and that he reported at 10:02 to train dispatcher at Raleigh, who immediately asked him to stop it. He tried by use of telephone, but could not do so. He had no orders for No. 6. No. 8 ran one hour late from Hamlet to Cameron. This was communicated to No. 6. Stewart was given a clearance card at Sanford. Page, the conductor on No. 6, testified that he arrived at Southern Pines at 9:47, and left at 10 o'clock, passed Manly at 10:06, and at 10:12 collided on the curve with No. 200 extra, when Stewart was killed. The witness had orders that No. 66 would run 40 minutes late; had no orders in regard to extra No. 200. Manly is 6.7 miles south of Vass, and Southern Pines 1.5 miles south of Manly, making 8.2. There is no telegraph office at Manly; a siding there. Niagra is a siding, being near Southern Pines, having no telegraph office. No. 200 had no conductor or flagman. It was going to Aberdeen to be used as a shifting engine. By the rules "extras are distinguished as passenger extras, freight extras, and working train extras."

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Defendant was operating over the road from Norlina to Hamlet, on June 23, 1903. 15 trains during the 24 hours, including extra No. 200. Defendant did not maintain a block system in the operation of its trains. Telegraph offices were maintained at an average distance of six miles between Hamlet and Raleigh. The rules (382, 383) provide that all extra trains are of inferior class to all regular trains of whatever class. A train of inferior class must in all cases keep out of the way of a train of superior class. Defendant introduced a large number of rules, not necessary to set forth at this point. It introduced the depositions of six witnesses, being general managers and superintendents, in regard to the use of the block system by their own and other roads and systems of railroads in this country. The general import of this testimony tended to show that the block system was in use on roads having a very heavy traffic, and when two or more very fast passenger trains are moving within short distances of each other, but that they did not consider it necessary for the protection of trains on single-track roads when the number of trains was not large. Several of the witnesses thought about 15 or 20 per cent. of the mileage of railroads used the block system. They agreed in the opinion that it tended to minimize the danger to operatives of roads using a single track and which is much crowded with traffic, and that it was an additional safeguard. Defendant introduced George Lutterloh, who testified: That on the day of the collision he was at work in his field near the track, that he saw two trains coming from opposite directions, knew there was no siding near Niagra, and knew they would run together. Ran to the track. No. 200 was coming round the curve. He went upon the track about 250 yards ahead of train. That engineer blew whistle as he came through the cut. Witness waived a large straw hat across the track. Engineer was hanging his head out of the window; did not slack up, but had plenty of time to do so after witness waived hat. Saw the fireman looking at him, and saw the collision. Witness thinks the engineer saw him, because he blew the whistle. Stewart was running fast. Plaintiff introduced Mr. B. R. Lacy, who qualified himself as an expert locomotive engineer and testified: "A train crew ought to consist of an engineer, a fireman, a conductor, and a flagman; but it depends entirely upon how many cars and how many brakemen you want. I do not think an engine ought to be sent out without a conductor. A light engine ought to have an engineer and a fireman and a conductor. I think there was a great deal more risk in trusting one man with one watch, than in trusting two men with two watches. I cannot tell you the degree, but two men intrusted with an engine, both watching the schedule and both with watches that have been examined by your examiner, there is very much less danger than in trusting the train with one man to look after the engine, to look at the schedule and his watch also. I am familiar with the rules under which the Seaboard runs. Under these rules it is not possible

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to have a head-on collision without somebody violating some of them. If there had been a conductor on extra No. 200, he would never have let engineer leave the station. You have never heard of a head-on collision with a conductor and engineer on such a train. Know the curve on which the collision occurred. It was so that the engineer had to get almost on it before he could see the other train. According to Lutterloh's testimony the curve would appear on the fireman's side of the engine."

Plaintiff alleged that the defendant was negligent in the following particulars: "(a) In that defendant sent intestate upon the said trip without furnishing a conductor and flagman for the said engine and tender which he was driving. (b) In that defendant failed to arrange a meeting place for extra 200, the train which plaintiff's intestate was operating, and train No. 6, which was moving in an opposite direction. (c) In that defendant's operator and agent at Vass failed to promptly notify the train dispatcher at Raleigh of the arrival at and contemplated departure of extra 200 from Vass. (e) In that defendant's agent and operator at Southern Pines failed to notify the defendant's train dispatcher at Raleigh of the arrival of No. 6 at Southern Pines, and the departure of said No. 6 from said station. (f) In that defendant permitted extra 200 to leave Vass, and No. 6 to leave Southern Pines, without giving to the crew of either train any knowledge of the movements of the other, when said trains were moving in the opposite direction and at a time when said defendant should have known that said trains would collide. (g) In that the crew of No. 6 violated rule 309 of said defendant in leaving Southern Pines in less than 20 minutes after another train, No. 8, moving in the same direction, had left said station. (h) In that the crew of No. 6 violated rule No. 405 of said defendant in leaving Southern Pines before the arrival and departure of No. 66, a passenger train which was delayed 40 minutes and was moving in the same direction. (i) In that defendant failed to have and maintain telegraph office and operators for the government of their trains, and in the management and protection thereof, at Manly, Niagra, and Lake View stations on the said road. (j) In that defendant did not deliver unto the said Stewart and the persons having charge of the said northbound train, which collided with said Stewart's engine, full, perfect, and proper orders to govern the running of said engine and north-bound train No. 6. (1) In that, while that portion of defendant's line of railroad upon which said collision occurred was much used and was congested with the traffic of very many trains, defendant neglected and failed to adopt and use in operation of the said train said Stewart was operating, and the train with which he collided, and of its other trains, that system of signals, telegraphic, electric, and mechanical devices, services, or operatives, rules, and regulations, commonly known as the 'block system,' which was at said time in general use, and was a necessary and proper safeguard and protection of the safety of the

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operatives of the defendant's trains." Defendant denied that it was negligent in either respect, and alleged that plaintiff's intestate was guilty of contributory negligence, in that he violated the orders of the company, failed to observe the signals that were given to him, and failed to stop when signaled by Lutterloh, and was guilty of contributory negligence in other respects. The specific exceptions and assignments are set out in the opinion, together with such portions of the judge's charge as are excepted to. There was a verdict for the plaintiff upon all of the issues. Motion for new trial denied. Judgment and appeal.

Pou & Fuller, Womack, Hayes & Pace, and Murray Allen, for appellants.

W. C. Douglass, Busbec & Busbee, and R. N. Sims, for appellee.

CONNOR, J. (after stating the case). It will be well to dispose of certain exceptions pointed to his honor's ruling upon objections to the admissibility of testimony before proceeding to discuss the instructions given to the jury and the refusal to give several of those asked. These exceptions are grouped in defendant's brief, because, as said, they present practically the same questions of law.

A number of rules prescribed by the company for the government of engineers in the operation of trains were introduced by defendant. It was shown that they were contained in a book, a copy of which was delivered to and in the possession of plaintiff's intestate. After qualifying Mr. Lane, chief train dispatcher, as an expert in the knowledge of the rules of the company relating to the management of trains, he was asked to explain the effect of various rules, to designate which rules were applicable to an existing state of facts, and to state the duty of an employee under these rules upon certain hypothetical facts. This class of testimony was, upon objection of plaintiff, excluded, for that the rules being in writing, their construction, application, and effect were for the court. The learned counsel for defendant concede that his honor's ruling is based upon a correct principle, but insist that there were a number of terms and expressions used in the rules which have a peculiar and restricted meaning, known to and understood only by those who operate trains. They do not cite any authorities to aid us in the decision of the question. It is well settled that where terms of art, or language peculiar to certain trades, business, etc., are used in writings, parol evidence may be introduced to show how, among persons engaged in such trade, etc., such terms are understood, to aid the court in interpreting the instrument. 1 Greenleaf, 280. When this is done, and technical terms, abbreviations, etc., are explained, it becomes the duty of the court to interpret the instrument in the light of such testimony. In doing so it may not call to its aid expert testimony. 1 Greenleaf, 277. We find nothing in the rules requiring or justifying resort to expert evidence in

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regard to the meaning of the language used. While there are a large number of rules, and, to one not familiar with the operation of trains, not so clear as might be desired, we see no reason why they may not be interpreted by giving to the language used its ordinary meaning and significance. The question was so decided in *Penna. R. R. v. Stoelke*, 104 Ill. 201, in which it was said: "The law, and not the rules of the company, define negligence. In the next place, it was asking the witness to construe the rule, which was not within the domain of verbal evidence." Treating the rules as a part of the contract of service made by defendant with plaintiff's intestate, it is clear that, being in writing, or what is the same thing, print, their construction is for the court.

Exception 7. Defendant proposed to ask Mr. Lane whether extra No. 200 was running solely by telegraphic orders. The question was, upon objection, excluded, and defendant excepted. Mr. Lane testified that regular trains were run on schedules, and extras on telegraphic orders. The orders which plaintiff's intestate received on June 23, 1903, were put in evidence by defendant, and its witness, through whom the orders came, testified that no other orders were given him. He met and passed No. 38 at Cameron without orders. Defendant contended that Stewart was bound, in the movement of his train, by the rules which were put in evidence, and that the special order did not in any way modify or abrogate such rules. We were of the opinion on the former appeal (137 N. C. 687, 50 S. E. 312) that as a conclusion of law, in the light of the rules, No. 200 was running solely by telegraphic orders. It was competent, and defendant was permitted to introduce all orders and rules of which Stewart had notice. It became the duty of the court to declare the law in regard to Stewart's duties and rights upon a construction of such rules and orders. Mr. Lane could not aid the court in that respect. He could not give his opinion, but only state facts, which he was permitted to do. There was no contradictory testimony in regard to the orders and rules. We concur with defendant's counsel that the special orders to Stewart did not abrogate the rules. The question is, what was his duty in the light of the order and rules? We shall discuss this question when we reach the exceptions to his honor's instructions to the jury. The exception cannot be sustained.

We have examined exceptions No. 17, 18, and 19, and do not find any harmful error, if error at all. There was no suggestion that the rules were unreasonable, and his honor, in his charge, treated them as binding upon plaintiff's intestate, constituting the measure and standard of his duty in operating his train.

In regard to exceptions 26 and 27 it is sufficient to say that the time-table and train sheets of June 23d were put in evidence, showing when No. 6 and No. 8 left Aberdeen. The testimony objected to was competent to show the movement of trains on the day of the collision. If defendant desired to have

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the jury restricted in their consideration of it to some particular phase of the case, a request to that effect should have been made. The same is true in regard to exception 30.

Exceptions 28 and 29 are abandoned in the brief.

Exceptions 31 to 34, inclusive, refer to the admission of testimony of Lacy, who was found by the court to be an expert as to the management, running, and equipment of trains. He was asked as to what constituted a train crew generally, also as to what was a proper train crew for light engines, and testified that an engine should not be sent out without a conductor. To the questions and answers the defendant excepted, insisting that the testimony was not within the rule admitting opinion evidence. "An experienced railroad man, who has made a business of the running and management of railroads, is as fairly an expert as one skilled in any other art, and he may give testimony as an expert in questions of railroad management. The running and management of railways is so far an art, out of the experience and knowledge of ordinary persons, as to render the opinions of ordinary persons skilled therein admissible in evidence." Rogers, Ex. Test., § 104, where cases are cited illustrating the extent to which this class of testimony has been received. Lawson, Ex. Ev. rule 22, and illustrations. In *Ogden v. Parsons*, 23 How. (U. S.) 167, 16 L. Ed. 410, it is said: "What was a full cargo for the ship to carry with safety was not a fact which could be settled by any rule of law or mathematical computation, and the court must necessarily rely upon the opinions of those who have experience, skill, and judgment in such matters." In *McCreary v. Turk*, 29 Ala. 244, Rice. C. J., said: "Upon such a question as the sufficiency of the number of the officers and hands on a steamboat at a particular time to run her on a particular river, the judgment of ordinary persons, having an opportunity of personal observation and of forming a correct opinion and testifying to the facts derived from that observation, is admissible. The effect of admitting such opinion as evidence is not to submit to the decision of the witness a point which the jury alone can try, but merely to assist them in judging of a question of common sense, as well as science, with which the witness may reasonably be supposed, on account of his superior opportunities for becoming acquainted with it and forming a correct judgment, to have been more competent to judge than they themselves." The opinion of a machinist that machinery was unsafe was admitted in *C. & A. R. R. Co. v. Shannon*, 43 Ill. 338. The decisions in which the general principle is applied are not uniform. We are of the opinion that the weight of authority and the reason of the thing sustain his honor's ruling. 12 Am. & Eng. Enc. 436.

The order upon which plaintiff's intestate operated the engine was directed to "conductor and engineman," as was also the order in regard to meeting No. 8 at Vass. Defendant's counsel requested his honor to instruct the jury, if they found all of the

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evidence to be true, to answer the first issue, "No," and to the refusal to do so excepted. This exception presents defendant's contention in regard to the several allegations of negligence. If there was evidence fit to be considered by the jury tending to sustain any one of the allegations, it is conceded that his honor could not have properly given the instruction. The controversy in this aspect of the case is narrowed to the duty which defendant owed to Stewart, in the light of the conditions shown to have existed on June 23, 1903. There was a presumption of negligence arising out of the proof of a collision in the daytime. *Wright v. Railroad*, 127 N. C. 229, 37 S. E. 221; *Stewart v. Railroad*, 137 N. C. 687, 50 S. E. 312, in which Clark, C. J., said: "If there were facts consistent with the absence of negligence on the part of the defendant, still there would be a conflict with the presumption of negligence—citing *Coffin v. U. S.*, 156 U. S. 459, 15 Sup. Ct. 394, 39 L. Ed. 481. His honor could not, therefore, have instructed the jury as requested, unless the uncontradicted evidence was sufficient matter of law to rebut the presumption. The train dispatcher knew, when Stewart reached Vass, that No. 66 was running 40 minutes late, and that the schedule required that No. 66, a first-class train should pass No. 6, a third-class train, at Southern Pines. The dispatcher further knew that Stewart, when he reached Vass, wanted "more time on No. 8, which he had orders to pass there. It will be noted that Stewart's order stated that No. 8 would wait until 10 o'clock for his train. When he arrived there at 9:38 No. 8 was not there. The dispatcher knew that No. 6 was at Southern Pines at 9:47. He wired operator at Vass that No. 8 would soon be there. It was due at Vass on schedule at 8:45, and was, therefore, running more than an hour late. In this condition of the trains, we look for some rule by which No. 6 should have been governed. Was it to wait at Southern Pines until No. 66 had passed, or to go on its schedule? The defendant says that it should have proceeded on its schedule. The only rule which seems to throw light upon the question is 405, which is as follows: "A train starting from its initial station on each division, or leaving a junction, when a train of the same class running in the same direction is overdue, will proceed on its own time and rights, and the overdue train will run as provided in rule 388 or 389." Rule 388 directs that passenger trains following each other must keep not less than 10 minutes apart. Rule 389 directs that freight trains must keep 10 minutes apart. Whether rule 405 applies in other respects, it certainly does not as controlling No. 6 in the conditions existing when it reached Southern Pines. It was a third-class local freight, while No. 66 was a first-class train.

Mr. Lane, one of defendant's witnesses, says that it was the duty of No. 6 to proceed on its schedule from Southern Pines, and his honor so charged the jury in special instruction No. 21. But plaintiff says that defendant was guilty of negligence, for

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that, when Stewart asked the train dispatcher at Vass for more time on No. 8, it put him on notice that he intended to proceed from Vass immediately upon the arrival of No. 8, and, knowing that No. 6 would proceed on its own time, and if Stewart left Vass at the same time a collision would occur, he should have notified Stewart to remain at Vass. While it is true that railroad companies may make reasonable rules for the government of their employees, and that it is the duty of the employees to obey such rules, and their failure to do so is evidence of contributory negligence, it is equally true that the ultimate standard of duty is fixed by the law, and not the rules; that the rules do not absolve the company from all duty to care for the safety of their employee. Independent of the statute of 1897, abolishing all assumption of risk by employees of railroads, no assumption of risk against defendant's negligence would be recognized. When the defendant's train dispatcher sent Stewart out on an extra with no conductor, to move over a road on which he must meet four trains, all but one of which were running "off time," and that one so running until it reached Southern Pines, it was its duty, measured by the standard of a prudent man, to keep a lookout for his safety—keep him advised of the movement of approaching trains. The measure of this duty was increased when the dispatcher learned that, having obeyed instructions to Vass, in the absence of any further orders, he intended moving from there immediately after No. 8 passed; and that, we think, was the reasonable construction of his request for "more time on No. 8." It was certainly a question for the jury to decide whether, with this information before him, the dispatcher should not have immediately notified Stewart that No. 6 was on time and leaving Southern Pines. While he may, in the absence of any suggestion to the contrary, have reasonably relied upon Stewart's knowledge of the rules and schedules, yet, when notified that for some reason Stewart was going forward, it seems to us that it is a reasonable requirement that he should have warned him of his danger. His failure to do so was at least evidence of negligence and proper to be considered by the jury.

His honor, at the request of the defendant, in the light of Lane's testimony, instructed the jury that the order in regard to No. 66 "enabled No. 6 to proceed from Southern Pines ahead of No. 66." This was Lane's construction of the rules, and, in the absence of any other evidence, accepted by his honor. The plaintiff excepted to the evidence. This, of course, goes for nothing, as the plaintiff does not appeal. After answering the question, Lane proceeds to give an illustration of the practical operation of the rule. He says that the order received by Stewart that No. 66 would run 40 minutes late "makes the schedule time of the trains named between the points mentioned as much later as the time stated in the order, and every other train receiving the order is required to run with respect to this later time, the same as before required to run with respect to this

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later time as can be easily added to the schedule time, that the order 40 minutes late could be added to the schedule time." On page 159, rule book, we find this identical language used by way of illustration. We also find in the same connection: "No. 41, engine 228, waits for train at Moncure until 10 a. m. for No. 6, engine 549. The train of inferior right is required to run with respect to the time specified, the same as before required to run with respect to the regular schedule time of the train of superior right." This language, as well as the reason of the thing, appears to us to mean that the schedule of No. 66 was fixed by the order to arrive at Southern Pines at 10:25, being 40 minutes added to the regular schedule, 9:45; that this change in the schedule of No. 66 operated to make a like change in that of No. 6, thereby causing the regular schedule of both trains to correspond, and leaving Southern Pines as the passing point as fixed in the time table. This is certainly the practical operation of the rule requiring any other train receiving the order to run with respect to this later time. Construed otherwise, No. 6 has no passing point with No. 66, and in the absence of any other orders it is to feel its way along the road without any knowledge whatever in regard to No. 200 extra. It is manifest that the construction which we have indicated was put upon the rule by Stewart and Taylor, the operator at Vass. There is no other explanation of their language and conduct. Taylor says: "Just as he was going out of the door, I turned around, and didn't even get out of my seat, and asked him how much time we had on No. 66, and he replied back to me from the door that he had 40 minutes on 66, and he was going to try to make Southern Pines. This was the last word he spoke to me." It is impossible to understand this language otherwise than by putting the construction upon it that they both understood that No. 66 was the controlling train, and that its schedule made the schedule of No. 6 at Southern Pines. No. 66 was a first-class train; No. 6, a third-class local freight. To say that both these men knew that No. 6 was leaving Southern Pines at the same time that Stewart was leaving Vass is to concede that they were insane or demented. That they were neither is conceded. With 40 minutes on No. 66, Stewart had 25 minutes to make Southern Pines, a distance of 8 miles. We think it manifest that such was his understanding, and we further think that, if he had read the example and illustration in his book of rules (page 159), he would have reasonably come to that conclusion. It is in this case a significant fact, shown by the defendant's evidence, that, while other trains were notified of conditions between Vass and Southern Pines, No. 6 had no notice that No. 200 extra was out, and No. 200 had no notice of the movement of No. 6. It is equally manifest that the failure to advise them was the cause of the collision. As we have said, this condition was permitted to continue after the operator at Vass knew Stewart was leaving

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on what is claimed to be the time of No. 6, and the dispatcher had knowledge of conditions which put him upon notice. The train sheet introduced shows that he had notice of the arrival and departure at each station of every train. There was other evidence, the testimony of Lacy in regard to the crew and that of witnesses in regard to the block system, which we will discuss in connection with the charge.

The defendant asked his honor to instruct the jury that, if they believed the entire evidence, the plaintiff's intestate was guilty of contributory negligence. To the refusal to give this instruction the defendant excepted. The burden of proof on this issue was upon the defendant, and it is conceded that the court could not direct an affirmative finding, unless the evidence relied upon to sustain it is uncontradicted and so clear that but one reasonable inference could be drawn from it. There was undoubtedly evidence tending to show negligence on the part of the plaintiff's intestate unless he was running solely on telegraphic orders, and then it would seem that he should have asked for orders at Vass before proceeding. It would seem, however, that, taking that view of the evidence, he may have reasonably relied upon the conduct of the defendant's dispatcher in regard to his request for time on No. 8. The defendant further says that he was guilty of contributory negligence in not stopping when signaled by Lutterloh. The prayer in this respect assumes that he saw Lutterloh, and in defiance of his signal drove forward to his death. We do not think his honor could have so found as a fact; it was a question for the jury.

His honor gave at the request of the defendant the following instructions in regard to contributory negligence: "If the jury shall find from the evidence that though there might have been a safer way of operating the defendant's trains, but that, notwithstanding this fact, if plaintiff's intestate had followed the rules of the company he would have been safe, and that his neglect in violating the rules, which, if followed, would have been safe to him, was a proximate cause of his death, then the intestate was guilty of contributory negligence, will answer the second issue 'Yes.' If the jury shall find from the evidence that the intestate was running an extra train under an order limiting his speed to 20 miles an hour, and that he ran his engine from Vass to the point of the accident at a greater speed than 20 miles an hour, and that this was the proximate cause of his death, and that, had he confined himself to the speed named in the order, the meeting of the trains would have taken place on a straight track, under such circumstances that the collision might have been avoided, then the intestate was guilty of contributory negligence and the jury will answer the second issue 'Yes.' (29) If the jury shall find from the evidence that the witness Geo. Lutterloh was in a position to see that a collision was imminent, and endeavored to stop the intestate in time to avert the same, and that the intestate saw him, or could have seen him by the

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exercise of ordinary care, and disregarded his efforts and continued to run the engine, thereby immediately and directly bringing about the collision, which he might have averted had he heeded the warning, he was guilty of contributory negligence, and the jury will answer the second issue 'Yes.' * * *

(31) If the jury shall find from the evidence that the intestate was running an extra train from Johnston Street to Aberdeen, and that he had no orders against No. 6, and that No. 6 was a regular scheduled train, and that he ran upon the time of No. 6 without such orders, then the intestate was guilty of a violation of the rules of the company. * * * (b) If the jury shall find from the evidence that the intestate was running an extra train, and that No. 6 was a regular scheduled train, then, under the rules of the company, it was his duty to clear the schedule of No. 6, and if he failed to do so he was guilty of a violation of the rules of the company. (c) If the jury shall find from the evidence that the intestate left Vass at 10:02, and that the scheduled time of No. 6 at Manly was 10:05, and that he was running an extra train without orders against No. 6, and that No. 6 was a scheduled train, and that the intestate could not clear any of the sidings before reaching Manly, five minutes before the scheduled time of No. 6, he was guilty of a violation of rules 390 and 383, which the court will read to the jury. (d) If the jury shall find, under the instructions just given by the court, that the intestate violated any of the rules of the company, and that such violation was the proximate cause of his death, then he was guilty of contributory negligence, and the jury will answer the second issue, 'Yes.'" His honor in his general charge instructed the jury in regard to contributory negligence, to which there was no exception. We are of the opinion that he gave the defendant the benefit of all to which he was entitled upon the second issue. He gave all that was requested, except the first, which would have taken the question from the consideration of the jury. He gave a large number of special instructions at the defendant's request upon the first issue. To his refusal to give others the defendant excepted. We will examine them in their order.

Exception 39. "That, if the jury shall find from the evidence that the system of moving trains on the defendant's road at the time of this injury was reasonably safe, and one in general use on railroads in the United States, then the defendant has not been guilty of negligence in this respect, and the jury will answer the first issue 'No.'" This he gave, after adding, "unless the jury shall further find that the block system was a safer system, and was in general use upon railroads of the United States of like character in respect of construction, and the amount of traffic as the defendant company." The criticism made by defendant of the modification of this instruction is that there was no evidence to sustain it. We have examined with care the depositions upon this question. They abundantly show

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that the block system used in moving trains increases safety and relatively decreases the danger of collision. This must be so upon the reason of the thing. It is difficult to tell to what extent the depositions show that the system is in general use. A number of railroad systems are named as using it. We are unable to tell the mileage, etc., of such roads. It is true that the witnesses generally describe the conditions in respect to number of trains run per day and the number of tracks. Certainly it would not show a general use of any system that only a few persons or corporations are using it. It is equally true that, as a matter of common observation, we know that in obedience of legislation, both state and national, and the ruling of commissions and courts, and as a matter of necessity for the security of life and property, railroad companies are rapidly adopting all such methods, systems, and improvements shown to reduce the number of accidents from collisions. What was regarded a safe system in this respect 10 years ago would now be regarded as utterly insufficient. In respect to such questions, the courts seek to secure the highest practicable safety for the public and employees. We think that there was evidence fit for the jury upon the general use of the block system, which, if enforced, prevents such disastrous collisions as the one shown by this record.

Several instructions were asked in regard to the duty of defendant to maintain telegraph offices along its road. His honor declined them, and in lieu thereof instructed the jury: "It is the duty of a railroad company to establish only such telegraph stations along its line as are necessary for the proper running of its trains, with regard for the safety of its employees and passengers; and, if you find that the defendant's telegraph stations were insufficient for this purpose, then the defendant has been guilty of no negligence in that regard." We think that this was a correct charge and covered the instructions asked.

Defendant requested his honor to instruct the jury that if they found that the rules of the defendant company permitted the running of an engine and tender with a crew of only an engineer and fireman, and such were the standard rules of the American Association of Railways, the defendant was not guilty of negligence in that respect. The instruction was given, with the words, "and that the running of an engine with such crew on such a trip as this one was reasonably safe," etc. We find no error in the charge as given.

Defendant requested his honor to charge the jury "that upon all of the evidence in this case it was not negligence to fail to use the block system." To the refusal defendant excepted. One witness testified that the system tended to give one train exclusive use of track between certain points. Another, that it induced to safety and economy—an additional safeguard, etc. The same witnesses testified as to the extent of the use of the system. In the light of the decisions of this court in *Troxler's*

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Case, 122 N. C. 904, 30 S. E. 117, and Greenlee's Case, 122 N. C. 979, 30 S. E. 115, 41 L. R. A. 399, 65 Am. St. Rep. 734; Troxler v. Southern Ry. Co., 124 N. C. 192, 32 S. E. 550, 44 L. R. A. 313, 70 Am. St. Rep. 580, often cited with approval, his honor correctly refused to give the instruction. He properly submitted the question to the jury. Stewart v. Railroad, 137 N. C. 687, 50 S. E. 312.

Defendant requested his honor to charge that, if the jury found the system of signals and rules for the operation of its trains in use by defendant were the same in general use at the time of the collision, then defendant was not guilty of negligence in failing to adopt another system, etc. The instruction was given, with the words, "unless they shall find that such system is safer or most approved and in general use in the United States by railroads of like condition as the defendant." To this language defendant excepted. Defendant contends that the language used by his honor does violence to the well-settled principle that the employer must use such appliances as are in general use, and not the most approved appliances. If his honor has inadvertently placed upon the defendant a heavier burden in this respect than the law permits, it is reversible error. In Bottoms v. Railroad, 136 N. C. 472, 49 S. E. 348, we held that it was error to charge the jury that the employer must use "the best approved devices and appliances for arresting sparks." It will be observed that in Bottoms' Case no reference was made to the "general use," which is an essential element in defining the test by which the duty is imposed. The Chief Justice in that case reviews the several decisions of this court. In Witsell v. Railroad, 120 N. C. 557, 27 S. E. 125, the court made the test to use "all known and improved machinery." This was held error; this court saying that the rule requires the use of "all such improved appliances which are in general use." The reasoning of the interesting opinion by the present Chief Justice shows clearly that the being in general use is the test. His honor evidently had that test in view in giving the instruction. It was not the "most approved," but "the most approved in general use." We do not think the jury could have been misled by the instruction as given.

In regard to the testimony of Lutterloh, his honor instructed the jury that if Stewart saw the witness, or by the exercise of ordinary care could have seen him, wave his hat, it was his duty to have stopped the engine, and if such violation was the proximate cause of the injury they would answer the second issue "Yes." This was correct.

There are 57 exceptions in the record. All of them are not assigned as error in the case on appeal. We have examined the record and briefs of counsel with care, and while it is not practicable to set out and discuss each exception, with the instruction asked, modified, and given, or refused, we are of the opinion that the case has been fairly submitted to the jury. It was tried

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by counsel of learning and experience. Every point was contested in the lower court and here. The jury have upon a full and fair charge found the facts. It may not be improper to say that, while many rules were introduced and commented upon, we are impressed, as said by the Chief Justice on the first appeal, with the view that No. 200 extra was running solely under telegraphic orders, and that the engineer was entitled to have such orders at each station. His last recorded words to the operator at Vass show that he regarded the road clear to Southern Pines; that he had 40 minutes on No. 66. This may account for his failure to take notice of Lutterloh's warning. Certain it is that No. 6 was the only train which seemed to have been overlooked by every one. No orders were given it, or others in regard to it. This was the cause of the collision. The case, stripped of all complications, comes to this: Some one overlooked No. 6. The law raises the presumption that it was the negligence of some of defendant's agents. The jury have found in accordance with this presumption. On the second issue the burden was on defendant to remove the presumption that Stewart exercised due care for his own safety. *Cogdell v. Railroad*, 132 N. C. 852, 44 S. E. 618. The court gave defendant every instruction asked, save one, upon this view of the case. The jury found the issue against defendant, and we think that there was evidence to sustain the verdict. We find no error in his honor's rulings.

The judgment must be affirmed.

SHANDREW v. CHICAGO, ST. P., M. & O. RY. CO.

(Circuit Court of Appeals, Eighth Circuit, November 13, 1905.)

[142 Fed. Rep. 320.]

Writ of Error—Questions Reviewable—Sufficiency of Objection to Testimony.—A general objection to a question asked a witness as "immaterial, incompetent, and irrelevant" is insufficient to sustain an assignment of error.

Master and Servant—Action for Injury of Brakeman—Instructions.*—On a trial of an action against a railroad company to recover for the death of a brakeman, alleged to have been caused by the bursting of a defective air brake hose on a freight train.

*For the authorities in this series on the question of the degree of care required of a railroad, as an employer, in furnishing safe appliances, see foot-notes appended to *Meehan v. Great Northern Ry. Co.* (N. Dak.), 18 R. R. R. 34, 41 Am. & Eng. R. Cas., N. S., 34; foot-notes appended to *Smith v. Fordyce* (Mo.), 16 R. R. R. 378, 39 Am. & Eng. R. Cas., N. S., 378; foot-note appended to *Randolph v. New York, etc., R. Co.* (N. J.), 8 R. R. R. 637, 31 Am. & Eng. R. Cas., N. S., 637.

For the authorities in this series on the question of the degree of care required of a railroad, as an employer, in inspecting appliances, see foot-note appended to *Crawford v. United Ry. & Elec. Co.* (Md.), 17 R. R. R. 527, 40 Am. & Eng. R. Cas., N. S., 527.

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an instruction was correct which stated that defendant was not liable, unless it failed to exercise ordinary care to provide a proper and fit hose and to keep it in good condition, and that the fact that the hose did burst by reason of its defective condition was not of itself sufficient evidence of defendant's negligence.

Same—Inspection and Testing of Air Brake Hose.—The court instructed the jury that for the discovery of defects in the air brake hose defendant was not required to adopt or apply any extraordinary inspection or tests which were not approved, practical, and customary, but fulfilled its duty if it adopted such tests and inspection as were ordinarily adopted and applied and regarded as sufficient by prudently conducted railway companies in like circumstances; also that, even if defendant failed to inspect or test the hose, proof of such failure was not sufficient evidence of negligence, unless it was also found from the evidence that the adoption and application of such tests and inspection as were ordinarily adopted and applied by prudently conducted railway companies in like circumstances would have disclosed the defective condition which caused the hose to burst. Held, that such instructions were correct, as merely stating in amplified form the rule of ordinary care.

Same.—An instruction that "defendant cannot be held liable in this case merely because of the fact that the hose which burst was a spliced hose" was correct, especially where it was shown by the evidence that the splicing of the hose does not weaken it.

Same.†—In view of testimony showing without contradiction that it was not customary for other railroad companies to test air brake hose by subjecting it to a pressure in excess of that to which it was subjected in use, it was not error to charge that defendant was not negligent because of its failure to apply such test.

In Error to the Circuit Court of the United States for the District of Minnesota.

This suit was instituted by the plaintiff in error, hereinafter called plaintiff, against the defendant railroad company to recover damages for the negligent operation of its railway resulting in the death of plaintiff's intestate. The specification of negligence found in the complaint is that defendant's servants, agents, and employees in charge of one of its freight trains suddenly and violently stopped the train while plaintiff's intestate, engaged in the discharge of his duty, was on the top of a car, and thereby precipitated him to the ground, and so injured him that he subsequently died. Descending to particulars, plaintiff alleges that the air brake hose with which the train was equipped was old, insufficient, and rotten to such a degree that it burst, and thereby suddenly set the air brakes, which caused the sudden and violent stopping of the train, and that although the defendant knew, or by reasonable observation and inspection might have known, the insufficient character of the air hose, it permitted the same to become old, weak and rotten, and insufficient for the purpose for which it was intended. The defense consisted of a denial of the alleged negligence and a plea of contributory negligence. The trial was to a jury, and resulted

†See extensive note, 18 R. R. R. 296, 41 Am. & Eng. R. Cas., N. S., 296.

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in a verdict and judgment in favor of the defendant. Plaintiff brings the case here by writ of error.

Christopher D. O'Brien (*Richard D. O'Brien*, on the brief), for plaintiff in error.

Thomas B. Wilson (*James B. Sheean*, on the brief), for defendant in error.

Before VAN DEVANTER, HOOK, and ADAMS, Circuit Judges.

ADAMS, Circuit Judge, after stating the case as above, delivered the opinion of the court.

There are three assignments of error predicated on admission of evidence over plaintiff's objections. Plaintiff's counsel states his objections to the questions as follows: (1) "I object to this as immaterial." (2) "I object to this as immaterial, incompetent, and irrelevant." (3) "I object to that as immaterial, incompetent, and irrelevant." These objections are generally insufficient upon which to predicate reviewable error. They fail to direct attention of the trial court to the objectionable feature complained of. Such general objections are frequently made at the inception of a trial, before the court is entirely familiar with the issues of a case, and when, of all times, it has a right to expect aid and assistance from counsel. To object to a question because it is "immaterial," or "irrelevant," without specifying why or in what particular, imposes the burdensome duty upon the court to immediately and carefully scrutinize the pleadings, with a view of ascertaining therefrom whether under any conceivable theory the proposed evidence would be material or relevant; a duty which, from the nature of things, the court can, at the outset of a trial, with difficulty perform. Counsel, on the contrary, from their familiarity with the case, not only understand the issues, but doubtless understand the immediate or remote bearing of any kind of evidence, and can readily advise the court why or in what respect a given question is immaterial or irrelevant. These observations apply with equal or greater force to an objection on the ground of incompetency. A witness may be incompetent as such, or the oral evidence of a fact, when some writing exists, may be incompetent evidence. Which of these, or many others that might be specified, is it? This can readily be answered by counsel. If he makes an objection, either on the ground of immateriality or incompetency, he knows his reasons for so doing, and must, unless it appears from the connection that the question is obviously or clearly inadmissible, state them, if he desires to claim error by reason of the court's action. The reasons for this rule may also be put on broader grounds. Counsel are officers of the court in quite the same sense as the judge is. Both are engaged in the serious work of administering justice. They should, therefore, work together to that end. Candor and freedom from reserve or disguise should equally characterize their conduct.

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This court at an early day had occasion to characterize the words "irrelevant, immaterial, and incompetent," commonly employed in connection with an objection to a question, as a "meaningless formula." It expressly ruled that a failure to state why a question was "incompetent" invalidated any exception saved to its admission. *Minchen v. Hart*, 72 Fed. 294, 18 C. C. A. 570. And at a later day this court held, citing many authorities, that an objection to a question that it was "immaterial," without more, was tantamount to no objection at all. *Eli Mining & Land Co. v. Carleton*, 108 Fed. 24, 47 C. C. A. 166. At this term, in the case of *Davidson Steamship Co. v. United States of America*, 142 Fed. 315, this court took occasion to say as follows:

"It has been held by this court many times that a trial court is justified in overruling an objection to a question or to evidence sought to be elicited thereby, when no ground is specified or when the ground mentioned is so general in form as to be insufficient to direct attention to the particular defect or objectionable feature ruled on."

The cases of *Sparf & Hansen v. United States*, 156 U. S. 51, 15 Sup. Ct. 273, 39 L. Ed. 343, *Burlington Ins. Co. v. Miller*, 60 Fed. 254, 8 C. C. A. 612, *Missouri Pac. Ry. Co. v. Hall*, 66 Fed. 868, 14 C. C. A. 153, and *Guarantee Co. v. Phenix Ins. Co.*, 59 C. C. A. 376, 124 Fed. 170, modify the general rule fully as far as the interests of justice demand. They appropriately recognize this rule, but hold that, when the reasons for ruling a given question immaterial or incompetent are obviously and clearly discernible, the general objection will be sufficient to require a ruling, and may be the basis of reviewable error. For the reason that the immateriality or incompetency of the questions complained of by plaintiff in error are not obviously or clearly discernible, we feel constrained to decline to consider the assignments of error predicated on general objections like those stated.

An exception was duly taken and preserved to the following portion of the court's charge:

"The mere fact that the hose did burst by reason of a defective condition is not of itself sufficient evidence that the defendant was negligent."

This portion of the charge is found in connection with and as a concluding part of the following:

"The defendant was not an insurer of the sufficiency or fitness of the air brake hose in question. It was only bound to exercise ordinary care to provide a sufficient and fit hose, and if it did use ordinary care it is not liable."

This case was apparently tried below on an issue that one of the acts of negligence charged against the defendant was that it failed to discharge its duty to properly inspect the hose in question, and that by reason of this failure the hose burst, proximately causing the death of plaintiff's intestate. It is doubtful if the pleadings warranted the trial of any such issue.

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But as the trial proceeded as if such an issue was joined, and as that is the theory of the argument before us, we shall, for the purpose of our decision, treat the case as if tried on that issue with others as stated in the complaint. The particular portion of the charge to which the exception now under consideration was taken is practically a statement that the fact that the accident happened is not sufficient proof of negligence. It is settled law that, as between a master and his servant, the maxim "*res ipsa loquitur*" has no application. *Union Pacific R. Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756, 38 L. Ed. 597; *Texas & Pacific Railway Co. v. Barrett*, 166 U. S. 617, 17 Sup. Ct. 707, 41 L. Ed. 1136; *Patton v. Texas & Pacific Railway Co.*, 179 U. S. 658, 21 Sup. Ct. 275, 45 L. Ed. 361; *Peirce v. Kile*, 80 Fed. 865, 26 C. C. A. 201. In the Barrett Case, *supra*, the Supreme Court had before it a case on the pleadings, facts, and procedure much like that now before us. The action in that case was to recover for personal injuries alleged to have been sustained by Barrett by reason of a weak and unsafe condition of stay bolts in a boiler, which resulted in an explosion. In that case the trial court gave the jury the following instruction:

"The master is not the insurer of the safety of its engines, but is required to exercise only ordinary care to keep such engines in good repair, and if he has used such ordinary care he is not liable for any injury resulting to the servant from a defect therein not discoverable by such ordinary care. The mere fact that an injury is received by a servant in consequence of an explosion will not entitle him to a recovery; but he must, besides the fact of the explosion, show that it resulted from the failure of the master to exercise ordinary care either in selecting such engine or in keeping it in reasonably safe repair."

This instruction, with others not necessary now to mention, was approved by the Supreme Court, saying:

"We think that these instructions laid down the applicable rules with sufficient accuracy in substantial conformity with the views of this court as expressed in *Hough v. Railway Co.*, 100 U. S. 213, 25 L. Ed. 612," and other cases there cited.

It thus appears that the Supreme Court in that case justified an instruction substantially like that complained of in this. It follows that there was no error in giving this.

In the next two assignments of error it is contended that the trial court erred in giving the following instructions to the jury:

"(1) For the discovery of defects in the air brake hose the defendant was not required to adopt or apply any extraordinary inspection or tests, which are not approved, practical, and customary; but it fulfilled its duty if it adopted such tests and inspection as are ordinarily adopted and applied and regarded as sufficient by prudently conducted railway companies in like circumstances. (2) Even if the defendant failed in any manner to inspect or test the air brake hose in question, such failure was not necessarily negligence, and proof of such failure is not

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sufficient evidence of negligence, unless you are also satisfied by the evidence that the adoption and application of such tests and inspection as are ordinarily adopted and applied by prudently conducted railway companies in like circumstances would disclose the defective condition thereof which caused the bursting of the hose."

These two instructions were requested by defendant's counsel, doubtless, because the court had in its general charge already said to the jury that the question for them to determine was "whether there was the proper care used in the inspection of this piece of hose," We perceive no error in these instructions. They state propositions of law abundantly supported by reason and authority. The court had in the main charge told the jury that ordinary care was the test of defendant's liability and had properly defined ordinary care to be "that care which an intelligent, prudent person engaged in that kind of business ordinarily exercises with respect to it." *Union Pac. R. Co. v. Daniels*, 152 U. S. 684, 691, 14 Sup. Ct. 756, 38 L. Ed. 597; *Washington, etc., R. Co. v. McDade*, 135 U. S. 554, 569, 10 Sup. Ct. 1044, 34 L. Ed. 235; *Choctaw, etc., R. R. Co. v. McDade*, 191 U. S. 64, 67, 24 Sup. Ct. 24, 48 L. Ed. 96; *Charnock v. Texas & Pac. R. Co.*, 194 U. S. 432, 437, 24 Sup. Ct. 671, 48 L. Ed. 1057; *Southern Pac. Co. v. Hetzer*, 135 Fed. 272, 283, 68 C. C. A. 26.

The two instructions complained of are but amplifications of this general definition of ordinary care. They say to the jury that the defendant was not required to adopt or apply any extraordinary inspection, or tests which are not approved, practical, and customary. In so saying the court has only given the converse of the proposition involved in its definition of ordinary care. It states that the law did not require the defendant to use extraordinary care. The first instruction complained of then proceeds:

"But it [the defendant] fulfilled its duty if it adopted such tests and inspection as are ordinarily adopted and applied and regarded as sufficient by prudently conducted railway companies in like circumstances."

What is this but a concrete application of the general definition of ordinary care? Manifestly, what other prudently conducted railroad companies ordinarily did in respect to tests and inspection in like circumstances as those which surrounded the defendant is the accurate test of the ordinary care which was required of the defendant in this case. An instruction in the same phraseology, and which, doubtless, inspired the one now before us, is found in the case of *Texas & Pacific Railway Co. v. Barrett*, *supra*. The jury in that case was told:

"That a railway company is not required to adopt extraordinary tests for discovering defects in machinery, which are not approved, practicable, and customary; but that it fulfilled its duty in this regard if it adopts such tests as are ordinarily in

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use by prudently conducted roads engaged in like business and surrounded by like circumstances.”

That instruction was approved by the Supreme Court as a correct exposition of the law applicable to a case quite similar in its facts to the one now under consideration.

Much that has already been said is applicable to the second instruction above quoted. It calls the jury's attention to the same test as is involved in the first instruction. It advises them that before they can find for the plaintiff they must be satisfied that the adoption and application of such tests and inspection as are ordinarily adopted and applied by prudently conducted railway companies in like circumstances would disclose the defective condition which caused the bursting of the hose. This is a different way of putting the proposition already stated in the instruction first given, and for the reasons stated is not erroneous.

Counsel for plaintiff earnestly urge upon our attention that these two instructions set up the conduct and management of other railroad companies as the ultimate criterion of the care which the defendant company was required to exercise. This is not correct. What other railroad companies did is not in itself a standard of care for the defendant, but is evidence only of that standard. It is evidence which the jury may consider under proper instructions in determining whether this defendant exercised ordinary care; that is, such care as other prudent persons engaged in the same business ordinarily exercised. The Supreme Court of the United States well expressed this thought in the case of *Texas & Pacific Railway Co. v. Behymer*, 189 U. S. 468, 23 Sup. Ct. 622, 47 L. Ed. 905, wherein it says:

“What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.”

From these observations it appears that the proof of what other railroads did under similar circumstances was properly treated in these instructions as evidence only of the standard of that ordinary care, which the law required the defendant to observe.

It is next contended that the trial court erred in giving the following instruction to the jury at the instance of defendant's counsel:

“It is a rule of law that railway companies have and must exercise much judgment and discretion in determining the kind and character of the appliances which they adopt, and there is a large field where their decision of doubtful questions in the affirmative or negative cannot be held to disclose any want of ordinary care; therefore, *the defendant cannot be held liable in this case merely because of the fact that the hose which burst was a spliced hose.*”

The unitalicized portion of this instruction undoubtedly expresses a correct general rule. It was so declared by this court

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in *Gilbert v. Burlington C. R. & N. Ry. Co.*, 128 Fed. 529, 531, 63 C. C. A. 27. The concluding or italicized portion of the instruction is a necessary corollary from the premise first stated. A spliced hose, so called, may be the best and safest. At any rate, in the exercise of the permissible judgment and discretion allowed the officers of a railroad company, it may be reasonably considered best and safest. But as to this we are not left to conjecture or implication. There is ample evidence tending to show that spliced hose is equally as strong as new hose, that splicing does not weaken it, that it was commonly used on railroad cars of different companies which found their way into defendant's yards, that it was received generally on interchange of cars, that its use was not economical, but more expensive than new hose. In the light of such evidence as this it was not erroneous to instruct the jury "that defendant company could not be held liable merely because of the fact that the hose which burst was a spliced hose."

It is next contended that the court erred in the following portion of its charge to the jury:

"Under the evidence in this case I charge you that the defendant cannot be held negligent because of its failure to apply to the hose in question the test of air pressure greatly in excess of that to which it was ordinarily subjected in the use thereof. There is no doubt about that. Ordinary care requires such care as is ordinarily used by a prudent person under the circumstances; and you have the evidence in the case of persons connected with this company and many others, the Northern Pacific, the Great Northern, the Milwaukee & St. Paul, and many others, as to the amount of pressure which is used. It is very evident, also, that it might not be the exercise of proper care to use very much greater pressure in testing hose, because, while it might stand the greater pressure at the time, the use of such greater pressure might tend to weaken the hose and render it more liable to burst, or might weaken it so that it would be more liable to receive other injuries, and more liable to burst in the future. In the absence of evidence that it is usual or customary, or regarded by prudent railroad men as essential, that this hose should be subjected in testing it to a much greater pressure, it would not be the exercise of such ordinary care to subject it to such greater pressure."

It is again argued by plaintiff's counsel that the court, in this portion of its charge, erects out of other companies' conduct a standard of care for this defendant. This objection, for reasons already stated, is without merit. The reference to what other railroads did is found in immediate context with the frequently repeated and correct definition of ordinary care. In the charge complained of the court calls attention to the evidence showing what different railroads did with respect to the application of pressure as a test. The evidence discloses, without contradiction, that no railroads applied what is called the reservoir pres-

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sure in advance of making use of the air brake hose. Witnesses of much experience in railroad business testified that they never heard of any company contriving a locomotive so as to make a test of air brake hose by giving it any more than the pressure which is usually applied in the use of a hose, and that they knew of no railroad company which used any greater pressure than the train line pressure for the purpose of inspecting the air brake hose. The evidence is all one way that railroads generally subjected their air brake hose only to the test of outward inspection, looking for escaping air and bruises. It is in the light of uncontradicted testimony such as this that the court told the jury that, under the evidence, the defendant cannot be held negligent because of its failure to apply to the hose a test of air pressure greatly in excess of that to which it was ordinarily subjected in its use. The reasons given by the learned trial judge why it might not be the exercise of reasonable care to use such greater pressure in making a test are probably sound, but whether so or not they do not affect the general rule stated by the court as applicable to the case under the testimony. The portion of the charge now under consideration is only a different way of expressing the principle declared in the first instruction complained of by plaintiff's counsel, wherein the court told the jury that:

"For the discovery of defects in the air brake hose the defendant was not required to adopt or apply any extraordinary inspection or tests which are not approved, practical and customary, but it fulfilled its duty if it adopted such tests and inspection as are ordinarily adopted and applied and regarded as sufficient by prudently conducted railway companies in like circumstances."

As already observed, this last quoted instruction has received the approval of the Supreme Court of the United States, and we fail to find anything in the portion of the charge excepted to now under consideration, which is inconsistent with the one so approved. This court had occasion in the case of *Northern Pac. R. Co. v. Blake*, 63 Fed. 45, 11 C. C. A. 93, to speak on the subject involved in our present inquiry. It there says:

"The generally accepted doctrine is that a railway company is not bound to use upon all of the cars in its possession the safest possible coupling appliances, or appliances of the latest and most improved pattern. It is at liberty to use such coupling appliances as are in use at the time by other well managed roads, and such as are regarded by competent railroad men as ordinarily safe and fit to be used."

This court approved that doctrine in the case of *Chicago, R. I. & P. Ry. Co. v. Linney*, 59 Fed. 45, 7 C. C. A. 656, wherein it approved of a charge given by the trial judge in the following language:

"A railroad company is not bound to see that the coupling appliances in use upon all of its own cars, or the cars in its

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possession received from other roads, are the safest possible appliances, or of the latest and most improved pattern. It may use such coupling appliances as are in use at the time by other railroads, and such as are regarded by prudent railroad men as ordinarily safe and fit to be used, even though such appliances are not of the latest and most improved pattern."

This same thought is also expressed by the Supreme Court of the United States in *Texas Pacific Railway Co. v. Barrett*, supra, wherein it is said that a railroad company "is not bound to insure the absolute safety thereof [meaning machinery and appliances], nor to supply the best and safest and newest of such mechanical appliances, but is bound to use all reasonable care and prudence in providing machinery reasonably safe and suitable for use and in keeping the same in repair."

Certain features of this case are made the basis of an earnest argument by counsel for the plaintiff. Attention is called to some of the facts disclosed by the record as follows: That the only test of the air brake hose applied by defendant and other railroad companies besides the ordinary train pressure of 70 pounds was the external inspection, which disclosed only whether air leaked through the hose or its joints or whether there were any visible bruises or defects in the hose; that such external inspection would not disclose the defects in the inner stratum of the hose; that the general practice of all railroad companies was to use such hose until it burst; and that defendant conformed to such general practice in the case now under consideration. From these facts an ingenious argument is constructed to the effect that no sufficient pressure test was made in this case, and that defendant was, therefore, liable for damages sustained by plaintiff's intestate. This argument involves the necessity referred to by the learned trial judge of requiring a railroad to subject its hose to a pressure, by way of preliminary test, above the 70 pounds to the square inch required in daily use, which might weaken or strain it and thus render it less able to endure the pressure of ordinary use. Moreover, this argument ignores other evidence found in the record, like this:

"I know of no way by which the frailty of that hose could be discovered, except by such pressure as would burst it. * * * There are no means of inspecting our air brake hose so as to ascertain whether it will burst under ordinary pressure," etc.

Assuming that this evidence is correct, or at least that it tends to show the truth, which, for the present purpose, must be assumed, it follows that the logical sequence of applying the test of extraordinary pressure urged by plaintiff's counsel is that railroads must, in all cases, before coupling up their cars with the air brake hose, subject it to a destructive pressure, that is, one which, according to some of the evidence, would cause it to burst. This of course is not sound. It suggests an impracticable and ruinous test. The whole argument discloses the inherent difficulty involved in a departure from well-established rules in the trial of actions at law.

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The case of *Randolph v. New York Central & H. R. R. Co.*, decided by the Court of Errors and Appeals of New Jersey, and reported in 55 Atl. 240, is a case similar in its main facts to that now before us. In that case it was urged that some magnifying glass, water arrangement, or extraordinary pressure over and above the ordinary train pressure of 70 pounds should be resorted to as a preliminary test. The court in dealing with the subject says:

"The duty of the employer is to exercise reasonable care and skill in making inspections and tests at proper intervals. * * * We think this duty is satisfied if the master exercises the same care that is ordinarily exercised in the same matter and that one engaged in practical operations is not bound to make either the inspections or the tests which may be possible in a laboratory or upon a small scale and outside of the practical conduct of affairs. The evidence leads us to the conclusion that the ordinary and reasonable inspection * * * did not require that the hose be subjected to the extraordinary pressure suggested. * * * Such a test seems to us too stringent to expect in actual practice. * * * This hose was subjected to the highest pressure expected to be applied to it in ordinary use and no better practical test is suggested than the actual application of the train pressure to the hose. It would be manifestly impracticable on each occasion to subject the hose to the test suggested."

We cannot perceive how the trial court could have instructed the jury very differently than it did, without having told them to find for the plaintiff. Such an instruction, under the undisputed facts of this case, would have been erroneous. The court not only laid down, but frequently referred, in its charge, to the general rule of care applicable to the case. It explained to the jury the proper bearing of the evidence relating to the customary way of testing hose by other railroad companies, and in every way, so far as we can perceive, kept well within established rules. Under these general instructions the jury was bound to consider all the evidence and to determine therefrom whether the external test applied by defendant and other railroad companies, evidence the requisite ordinary care, or whether under defendant's obligation to use ordinary care it was its duty to have subjected its hose to some extraordinary pressure above that required in daily use.

We think the charge as a whole fairly presented these controlling issues to the jury and that the portions excepted to, when considered with the balance of the charge, are free from error. The judgment is accordingly affirmed.

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(Court of Appeals of New York, Nov. 21, 1905.)

[75 N. E. Rep. 965.]

Railroads—Accident at Crossing—Contributory Negligence.*—In an action to recover for the alleged negligent killing of plaintiff's intestate on defendant's railroad track, where the evidence either shows an unimpeded view of the approaching train for several hundred feet at a point near to defendant's tracks, or that the smoke and steam from a train on an intersecting road had so settled down upon the tracks as to obstruct the view at the time, so that it was the duty of the deceased to stop until the obstruction had ceased, it establishes contributory negligence as a matter of law.

Same—Presumptive Right to Cross Tracks.†—Under Laws 1892, p. 1394, c. 676, § 53, providing that no person other than those connected with the railroad shall walk upon the track, except where the same crosses streets or highways, a presumptive right to cross the tracks of a railroad company at a point not a highway or street crossing cannot be required, even by long user, where it is necessary to walk along the tracks of an intersecting railroad to reach such point of crossing.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by William C. Keller, administrator of Daniel Keller, against the Erie Railroad Company. From an order of the Appellate Division (90 N. Y. Supp, 236, 98 App. Div. 550), reversing a judgment for plaintiff, he appeals. Affirmed.

*For the authorities in this series on the subject of contributory negligence in attempting to cross railroad tracks in front of a train which was seen, or would have been seen, by the highway traveler before he made the attempt, see foot-notes appended to *Criss v. Seattle Elec. Co.* (Wash.), 17 R. R. R. 853, 40 Am. & Eng. R. Cas., N. S., 853; *Coats v. Seattle Elec. Co.* (Wash.), 17 R. R. R. 165, 40 Am. & Eng. R. Cas., N. S., 165; foot-notes appended to *Southern Ry. Co. v. Carroll* (C. C. A.), 16 R. R. R. 488, 39 Am. & Eng. R. Cas., N. S., 488 (trains or cars seen before making attempt).

For the authorities in this series on the subject of contributory negligence in attempting to cross railroad tracks as affected by fact that the view of approaching trains is obstructed, see foot-notes appended to *Colorado & S. Ry. Co. v. Thomas* (Colo.), 17 R. R. R. 167, 40 Am. & Eng. R. Cas., N. S., 167; *Coffee v. Pere Marquette R. Co.* (Mich.), 16 R. R. R. 772, 39 Am. & Eng. R. Cas., N. S., 772.

†For the authorities in this series, on the question, who are, and are not, licensees on railroad tracks or premises, see foot-notes appended to *Curtis v. Oregon R. & Nav. Co.* (Wash.), 17 R. R. R. 377, 40 Am. & Eng. R. Cas., N. S., 377; *St. Louis S. W. Ry. Co. v. Shiflet* (Tex.), 17 R. R. R. 373, 40 Am. & Eng. R. Cas., N. S., 373; *Elgin, etc., Ry. Co. v. Thomas* (Ill.), 17 R. R. R. 356, 40 Am. & Eng. R. Cas., N. S., 356; foot-notes appended to *Hern v. Southern Pac. Co.* (Utah), 17 R. R. R. 179, 40 Am. & Eng. R. Cas., N. S., 179; foot-note appended to *Illinois Terminal R. Co. v. Mitchell* (Ill.), 16 R. R. R. 835, 39 Am. & Eng. R. Cas., N. S., 835; *Willis v. Vicksburg, etc., Ry.* (La.), 16 R. R. R. 590, 39 Am. & Eng. R. Cas., N. S., 590; *Dalin v. Worcester Con. St. Ry. Co.* (Mass.), 16 R. R. R. 476, 39 Am. & Eng. R. Cas., N. S., 476.

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The action was brought to recover damages of the defendant for having negligently caused the death of the plaintiff's intestate. The negligence alleged is that, while the deceased was lawfully and rightfully upon the defendant's railroad tracks, one of its trains, through carelessness in operation, came into collision with him. The accident occurred in a part of the city of Buffalo where the defendant's tracks cross an unoccupied tract of land between city streets. Hertel avenue lies to the north of this land, on the east is Military Road, (an important street of the city), and on the west are the tracks of the Niagara branch of the New York Central & Hudson River Railroad Company. Towards those tracks the defendant's road curves, in a southwesterly direction, from Military Road. A Y branch of the New York Central & Hudson River Railroad Company, crossing Hertel avenue and curving in a southeasterly direction, crosses the defendant's tracks, at a point some 420 feet distant from Military Road, and connects, some 170 feet beyond, with the belt line of the New York Central & Hudson River Railroad Company, which lies to the south of the defendant's road and is parallel therewith and close thereto. This Y branch consists of a double track, and is built, as are the other tracks over this tract of land, upon an embankment; the general surface of the land being considerably depressed below the street levels. Near where Hertel avenue is crossed by the Y branch is a malthouse, in which the deceased was employed. He and his fellow workmen had been accustomed, as had other persons, for many years, to walk along the tracks of this Y branch, in order to reach Military Road by a short cut. Upon the day in question, March 25, 1902, at about 5 o'clock in a clear afternoon, the deceased and two companions were walking from Hertel avenue, upon the tracks of the Y branch. In approaching its point of junction with the defendant's tracks, a pile of stones, placed between the two railroads, obstructed the view from the latter's tracks to the west; but, when passed, a clear view was possible in that direction, for upwards of 400 feet. When they were approaching the defendant's tracks, a train of the New York Central & Hudson River Railroad Company was passing, upon that company's tracks, to the west. According to the testimony for the plaintiff, the deceased and his companions stopped, looked up the defendant's tracks to the west, saw no train, and continued walking upon the Y tracks and over those of the defendant. A train of the defendant, coming from the west upon defendant's southerly track, without signals or warning of its approach, struck two of them, killing the one and injuring the other. From the testimony of one of the party, the jury might have believed that steam and smoke from the passing train of the New York Central & Hudson River Railroad company obstructed for the moment a view to the west. The plaintiff recovered a verdict against the defendant at the Trial Term, but, upon appeal to the Appellate Division

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in the Fourth department, the judgment entered upon the verdict was reversed, and a new trial was ordered; the reversal being upon questions of law only.

J. H. Metcalf and Frederick G. Bagley, for appellant.

Adelbert Moot, for respondent.

GRAY, J. (after stating the facts). It appears, upon reference to the opinion below, that the Appellate Division justices considered the evidence as conclusively proving the deceased to have been guilty of contributory negligence. It either showed that an unimpeded view of the approaching train was possible for several hundred feet, at a point near to the defendant's tracks, in which case the deceased could have seen the train, had he actually looked, or, if it could be believed that smoke and steam from the passing train of the New York Central & Hudson River Railroad Company had so settled down upon the tracks as to obstruct the view at the time, then it was his duty to stop until the obstruction had ceased. *Heaney v. L. I. R. R. Co.*, 112 N. Y. 122, 19 N. E. 422. It was said that, "whether we accept as the truth that the smoke and steam temporarily obscured the outlook, or whether there was nothing to shut off the sight of the train, the plaintiff ought not to have recovered." We quite agree with the learned justices that the deceased had been guilty of contributory negligence, as matter of law. He was indifferent, apparently from the evidence, to an imminent and evident peril. If, and the plaintiff so contends, the evidence did not show that the view was obstructed by smoke and steam, then the testimony that the witnesses did not see the defendant's train, on this bright, clear afternoon, with no intervening obstruction, is incredible as matter of law. It was inherently improbable; for it was impeached by physical facts and should be rejected. See *Dolfini v. Erie R. R. Co.*, 178 N. Y. 1, 4, 70 N. E. 68; *Hudson v. R., W. & O. R. R. Co.*, 145 N. Y. 408, 412, 40 N. E. 8.

We would be satisfied to affirm the order of reversal without further opinion, were it not that another ground, upon which the plaintiff should have failed in his action, has been negatived in the opinion below. It was considered, as "the use of the defendant's tracks at this point by pedestrians had been so general, notorious, and long-continued, that the defendant can fairly be said to have acquiesced in that use," and that persons, who had been in the habit of making use of its tracks, stood towards it in the character of licensees, to whom the duty was owing of giving warning of the approach of trains at that point. This, in my judgment, was distinctly erroneous. I think that it was not within the power of the defendant to permit or to suffer persons not in its employment to walk upon and along its tracks at a place where there was no highway and but an intersection of railroad tracks, and that no length of acquiescence in their doing so, under the circumstances of this case, could

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create a right of user, by license or by sufferance. This ought to be clear from section 53 of the railroad law (Laws 1892, p. 1394, c. 676), which was intended to protect the traveling public, as well as the railroad companies. It reads that "no person other than those connected with or employed upon the railroad shall walk upon or along its track or tracks, except where the same shall be laid across or along streets or highways, in which case he shall not walk upon the track unless necessary to cross the same." It is not easy, if at all possible, to see how any right, as by license, could be acquired through acquiescence to do something which was so clearly in violation of the statutory inhibition. An act expressly prohibited by the public statute is, in its inception and always must continue to be, unlawful. The defendant's powers and capacity to act are defined and controlled by statute law and, as a creature of statute, it could neither expressly nor passively confer a right which the statute denies. Whoever walks upon or along the tracks of a railroad, except when necessary to cross the same upon some street, highway, or public place, violates the law and is like a trespasser, and the company's servants are under no other obligation than to refrain from willfully or recklessly injuring him.

The case falls within the precise inhibition of the railroad law, because, at the point where the accident happened, there was neither street nor highway justifying the use of the tracks for a crossing. As it has been shown, the use was merely for convenience in making a short cut between the streets, and the traveling of the public was from railroad track to railroad track. Even in cases where persons were killed or injured while merely crossing railroad tracks, and where, by reason of the situation and from the force of circumstances, a license to cross was deemed to be implied, it has been held that they took the risks incident thereto and of the dangers, to which they might be exposed from the management of the road in the usual and ordinary way, and that no other duty rested upon the railroad company than not to intentionally or wantonly injure them. See *Nicholson v. Erie Railway Co.*, 41 N. Y. 525; *Sutton v. N. Y. C. & H. R. R. R. Co.*, 66 N. Y. 243; *Gunther v. N. Y. C. & H. R. R. R. Co.*, 81 App. Div. 606, 81 N. Y. Supp. 395; *Lagerman v. N. Y. C. & H. R. R. R. Co.*, 53 App. Div. 283, 65 N. Y. Supp. 764. The cases of *Barry v. N. Y. C. & H. R. R. R. Co.*, 92 N. Y. 289, 44 Am. Rep. 377, and *Byrne v. Same*, 104 N. Y. 362, 10 N. E. 539, 58 Am. Rep. 512, are not in point; because the persons injured were crossing the tracks at points where it was conceded that there was a right of way, or an alley, or public passageway, by reason whereof it was incumbent upon the railroad company to exercise reasonable care in the movement of its trains. Such cases as those come manifestly within the exception of the statute. Here there was nothing of the kind. The defendant's tracks, in the locality of the

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accident, were distant from any street or highway, and no excuse, save that of convenience, justified their use by the deceased and his companions. The engineer had the right to assume that they would get off the tracks and was under no obligation to depart from the usual way of operating his train. *Spooner v. Del., L & W. R. R. Co.*, 115 N. Y. 22, 33, 21 N. E. 696.

The question discussed was sufficiently raised by the denials of the motion to dismiss the complaint and to direct a verdict; inasmuch as the evidence had failed to show any neglect of a duty owing to the deceased, or any wanton or willful conduct on the part of the defendant's servants, and it was expressly raised by the exception to the refusal of the court to instruct the jury that the defendant was not required to treat the place of the accident as a public street or sidewalk or alleyway.

For the reasons which have been given, the order appealed from should be affirmed, and judgment absolute should be awarded to the defendant, upon the plaintiff's stipulation, with costs in all the courts.

VANN, J. I concur in the result only, and expressly dissent from the last ground upon which the judgment is based by the prevailing opinion. The effect of the decision is that any one not connected by employment or otherwise with a railroad company, who walks upon its tracks at a point where there is no highway, even with its consent, is a trespasser, and the company need use no care whatever to avoid running over him, provided it does not do so wantonly or recklessly. The sole reason advanced for this harsh conclusion is that a statute prohibits all persons from walking upon the tracks of a railroad, except where they are laid across or along a street. Railroad Law, Laws, 1892, p. 1394, c. 676, § 53. The next sentence of the same section, however, prohibits a person from leading a horse on a railroad track under like circumstances "without the consent of the corporation." According to the result reached by the court, the more dangerous act can be effectively permitted by a railroad company, while the less dangerous cannot.

The statute is not new, for the same prohibition, in substantially the same words, appears in the act under which nearly all the railroads in the state were organized. Laws 1850, p. 233, c. 140, § 44. The Legislature, as I think, did not intend to make one a trespasser, or an outlaw, or to withdraw from him the ordinary protection of the law, if he walks on a railroad track with the consent of the company that owns it, given either expressly or by acquiescence for so long a period as to have the same effect. That would not be a reasonable or humane construction, nor has the statute been so understood by the bar or the courts during the long time it has been in force.

Thus, in a case which arose long after the original statute was passed, the decedent was negligently run over by a railroad train while crossing the track at a point where the owners of

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adjacent land had a right of way and the public had been in the habit of crossing for 30 years. The court held the company liable, giving no heed to the private right of way with which the decedent had no connection, and sustaining the recovery on the ground of implied permission. Judge Andrews, speaking for the court, said: "There can be no doubt that the acquiescence of the defendant for so long a time in the crossing of the tracks by pedestrians amounted to a license and permission by the defendant to all persons to cross the tracks at this point. These circumstances imposed a duty upon the defendant in respect of persons using the crossing to exercise reasonable care in the movement of its trains. The company had a lawful right to use the tracks for its business and could have withdrawn its permission to the public to use its premises as a public way, assuming that no public right therein existed; but, so long as it permitted the public use, it was chargeable with knowledge of the danger to human life from operating its trains at that point, and was bound to such reasonable precaution in their management as ordinary prudence dictated to protect wayfarers from injury. * * * In the case of the movement of a train of cars over a track at a place which the public are permitted to use as a crossing, the company are necessarily apprised that it is attended with danger to life. The company is an actor at the time in creating the circumstances which imperil human life, and it would be alarming doctrine that it was under no duty to exercise any care in the movement of its trains." *Barry v. N. Y. C. & H. R. R. Co.*, 92 N. Y. 289, 292, 44 Am. Rep. 377. The same result was reached in a later case, in which Judge Earl, after reviewing all the authorities, held, as stated in the syllabus, that: "Where the public for a long period of time have notoriously and constantly been in the habit of crossing a railroad at a point not in a traveled public highway, with the acquiescence of the railroad corporation, this acquiescence amounts to a license and imposes a duty upon it, as to all persons so crossing, to exercise reasonable care in running its trains so as to protect them from injury." *Byrne v. N. Y. C. & H. R. R. Co.*, 104 N. Y. 362, 10 N. E. 539, 58 Am. Rep. 512. These cases have never been overruled. They are later in date than any decision by this court cited in the prevailing opinion to uphold the doctrine there laid down. I regard them as controlling, although the effect of the statute was not considered in either.

Moreover, the same section which contains the prohibition in question relieves a railroad company from liability to a passenger injured while on the platform of a car in violation of a regulation duly posted, but it does not relieve the company from liability for negligently running over a man walking on its tracks in violation of the statute. It creates no right which the defendant can enforce against a pedestrian who did nothing but what it consented to. There is no breach of duty to the

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defendant, but, according to the most extreme view, a breach of duty to the state. Assuming that the state might punish him for violating the statute, the defendant is estopped from pleading an act done with its consent, as a defense to its own negligence. Pen. Code, § 155. It cannot consent to an act and then claim that the act excused its own wrongdoing. If the violation of a statute directly contributes to the injury, a recovery may be denied on the ground of contributory negligence, but that falls far short of the proposition that one walking on the track with the consent of the owner of that track may be run over without any liability for gross carelessness, provided only the company mercifully refrains from wanton or reckless injury.

Even if the act of the decedent in walking on the track, although consented to by the defendant, was unlawful, it constituted no defense to the action. The only effect of his act was to place him in a position where the defendant's negligent act could injure him. It was a condition, not a cause. Walking on the track did not injure him. His own act was not the agency which caused his death, but the negligent running of the train by the defendant. He did not kill himself. The defendant killed him. His act, if unlawful, was not the proximate cause, for the result would have been the same if his act had been lawful. The statute does not make his act a defense, and the courts should not, any more than if he had been negligently run over by the defendant while traveling in violation of the Sunday law, or while driving at a rate of speed forbidden by law. In such cases, as this court has always held, the violation of the statute is not the immediate cause of the injury and will not defeat a recovery. *Connolly v. Knickerbocker Ice Co.*, 114 N. Y. 104, 108, 21 N. E. 101, 11 Am. St. Rep. 617; *Platz v. City of Cohoes*, 89 N. Y. 219, 42 Am. Rep. 286; *Wood v. Erie Ry. Co.*, 72 N. Y. 196, 28 Am. Rep. 125; *Hoffman v. Union Ferry Co.*, 68 N. Y. 385; *Carroll v. Staten Island Railroad Co.*, 58 N. Y. 126, 132, 17 Am. Rep. 221.

Finally, no such defense was set up in the answer and no such question was raised by any exception taken at the trial. So far as the appeal book shows, the statute was not alluded to, directly or indirectly, from the service of the summons until after the verdict was rendered. The trial court had no opportunity to consider it. If the point had been raised, non constat evidence of willful and intentional injury would have been introduced by the plaintiff. "An objection cannot be taken for the first time upon appeal which might have been obviated if raised below; it must appear that no possible answer could have been made to it." *Osgood v. Toole*, 60 N. Y. 475, 479. With the record in this condition we have no power to consider or decide the question, because it is not before us. *Hecla Powder Co. v. Sigua Iron Co.*, 157 N. Y. 437, 52 N. E. 650; *Wicks v. Thomson*, 129 N. Y. 634, 29 N. E. 301.

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I vote to affirm and for judgment absolute, but solely on the ground that the plaintiff's intestate was guilty of contributory negligence as matter of law.

CULLEN, C. J., As to the point of difference between my Brothers Gray and Vann I entertain this view: The statute prescribes: "No person other than those connected with or employed upon the railroad, shall walk upon or along its track or tracks, except where the same shall be laid across or along streets or highways, in which case he shall not walk upon the track unless necessary to cross the same." I concur with Judge Vann in the proposition that by long user the public may acquire, despite the terms of the statute, a presumptive right to cross a railroad track at a point that is not a street or highway. The proposition seems to be sustained by the authorities. In this case, however, the point at which the deceased sought to cross the defendant's railroad was where it was intersected by the tracks of the New York Central Railroad Company, which tracks he had been using as a path in traveling to and from the brewing house where he was employed. The command of the statute is explicit, and subject to no qualification, that a person other than an employee of a railroad shall not walk upon its tracks, except where it is necessary to cross the same. The deceased was not only crossing the tracks of this defendant at a point that was not a highway or street crossing, but he was traveling along the tracks of the New York Central Railroad Company. Now, if we assume that, by acquiescence on the part of the company and user by the public, the public may acquire a right to cross the company's tracks, at any other point, there is, nevertheless, a point at which the public cannot acquire such a right, and that is where another railroad intersects those tracks. In the face of the explicit command of the statute the public cannot by user acquire the right to use the tracks of one railroad as a highway, and therefore it cannot acquire the right to cross the tracks of another railroad at its intersection with the first.

I concur in the affirmance of the judgment appealed from; also upon the ground stated by the learned Appellate Division.

HAIGHT and WERNER, JJ., concur with GRAY, J. BARTLETT, J., concurs with VANN, J. CULLEN, C. J., reads for affirmance. O'BRIEN, J., absent.

Ordered accordingly.

CINCINNATI, N. O. & T. P. RY. CO. *v.* CECIL.

(Court of Appeals of Kentucky, Jan. 30, 1906.)

[90 S. W. Rep. 585.]

Railroads—Fires—Negligence—Questions for Jury.—In an action against a railroad for the destruction of plaintiff's property through fire caused by sparks from defendant's engines, evidence examined, and held sufficient to go to the jury on the question of defendant's negligence.

Same.—In an action against a railroad for the destruction of plaintiff's property by a fire started in a car on defendant's track and alleged to have been caused by sparks from one of its engines, the question whether it was a physical impossibility for the sparks from the engine to have ignited the car held one for the jury.

Trial—Instructions—Applicability to Pleadings.—Where, in an action against a railroad for the destruction of plaintiff's property by fire, the petition alleged that the fire was caused by the negligence of defendant in allowing sparks to escape from its engine, and which sparks ignited an empty car, whence the fire was communicated to plaintiff's property, instructions authorizing the jury to find for plaintiff if they believed that defendant negligently left the car open after it was unloaded, or that it was negligence to leave it on the track where it stood when burning, whether the fire originated from the sparks from the engine or not, were erroneous.

Same—Request for Instructions—Necessity.—In an action against a railroad for the destruction of plaintiff's property by fire, the omission of the court in charging to define negligence or diligence as related to the care required of defendant was not erroneous, where no instruction as to these words was requested.

Railroads—Fires—Destruction of Property—Contributory Negligence of Owner.*—In an action against a railroad for the destruction of plaintiff's property by fire caused by sparks from defendant's engine, instructions predicated on the additional risk assumed by plaintiff in using a wareroom close to defendant's track were erroneous, as the erection and use of a building for ordinary purposes near a railroad track is not negligence, though the danger of fire at such point is greater.

Same—Spark Arresters—Evidence.—Where, in an action against a railroad for the destruction of plaintiff's property by fire alleged to have been caused by sparks from defendant's engine, the defense was that the spark arresters used by defendant and with which all its engines were equipped were of the best type known to science, several of defendant's employees testifying that no cinder greater in diameter than a quarter of an inch could escape through the meshes of the arresters, it was error to refuse to permit plaintiff to place in evidence cinders of more than a quarter of an inch in diameter found by him along the line of defendant's track.

Appeal from Circuit Court, Boyle County.

"Not to be officially reported."

Action by Charles P. Cecil against the Cincinnati, New Orleans & Texas Pacific Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

John Galvin and Chas. H. Rodes, for appellant.

Fox & Jackson, for appellee.

*See foot-notes appended to *St. Louis, etc., R. Co. v. League* (Kan.), 17 R. R. R. 772, 40 Am. & Eng. R. Cas., N. S., 772.

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BARKER, J. On the night of the 20th of February, 1903, a warehouse in Danville, Ky., in which appellee had stored a lot of farm machinery, was burned; the fire having been communicated to it by a burning car belonging to the appellant, which was standing on a switch very near the warehouse occupied by the appellee. The loss was practically total, and, appellant having credit by the sum of \$1,500 received from an insurance policy which covered the property, appellee sued for the balance of \$1,845, alleging that the fire, which destroyed his storehouse and its contents, was caused by the negligence of appellant in permitting sparks from one of its engines to set fire to the car and in this way communicate it to his building. The petition contains the further allegation that after the car was ascertained to be on fire the appellant company could have prevented his loss by the exercise of ordinary diligence in moving it away before his house was ignited. All of these allegations were put in issue by the answer, and in addition there was a plea of contributory negligence in bar of appellee's claim. The affirmative allegations of the answer were denied by reply. A trial resulted in a verdict in favor of appellee for the sum claimed in his petition, \$1,845, and from the judgment based thereon this appeal is prosecuted.

The following is a statement of the crucial facts of this case as we understand them: Appellee's storehouse was within a very few feet of appellant's "unloading switch" in Danville. During the day of the 20th of February, 1903, several cars of merchandise were pushed in on this switch by appellant for the purpose of being unloaded by the consignees. One of them was loaded with bales of sawdust or shavings such as is used for bedding horses by liverymen. The consignees of this car finished unloading it between 4 and 5 o'clock of the afternoon of the 20th of February. Some of the bales were broken, and their contents scattered on the floor of the car. These loose shavings were not swept up with a broom, but the floor was raked with an iron scoop as well as could be done, with the result that at least a small quantity of the material was left in the car. The door on the side next the appellee's warehouse was not unsealed or opened, but that on the other side, towards the main track, was left open after the unloading was done. Three trains passed on the main track on the evening that the fire occurred. Two were passenger trains going south, and as they came in on a downgrade the steam was shut off and they merely rolled in, making it impossible, as it is said, that the engines drawing them could have emitted sparks. There was one heavy freight train, which came in about 8 o'clock p. m. It was drawn by two engines, and, coming from the south towards the north, the track was on an upgrade as it passed the car which was burned. About half past 9 o'clock the empty car referred to was seen to be on fire, and before it could be either removed or the flames quenched the fire was communicated to the warehouse of appellee, causing, as said before, practically a total loss of the property stored therein.

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No one saw sparks fall on or in or around the car in question, and it must be admitted that the evidence that the fire was caused by sparks from the engines of appellant's trains is exceedingly meager; but we have reached the conclusion, in the light of the cases heretofore decided, that this was a question for the determination of the jury. In the case of *Louisville & Nashville R. Co. v. Samuel's Ex'rs*, 57 S. W. 235, 22 Ky. Law Rep. 303, after stating the rule as to the nonliability of railroads for fire resulting from escaping sparks if the engines were furnished with approved spark arresters, it is said: "But it is equally well settled that in an action against a railroad company to recover for loss by fire alleged to have resulted from negligence in operation, or for failure to have the spark arrester in proper condition, testimony showing that sparks and cinders escaped from the locomotive in unusual quantities was competent, and will, of itself, warrant the presumption that the arrester was out of order, or was improperly adjusted, and that the defendant was consequently guilty of negligence in this regard"—citing *Louisville & Nashville R. R. Co. v. Taylor*, 92 Ky. 52, 17 S. W. 198; *Kentucky Central R. R. Co. v. Barrow*, 89 Ky. 643, 20 S. W. 165. And this same principle was enunciated and upheld in *Mills v. Louisville & Nashville R. R. Co.*, 76 S. W. 29, 25 Ky. Law Rep. 488.

As said before, the evidence on this branch of the case was meager; but there was one witness, Lawrence Rogers, who said: "I went to the planing mill, and my attention was called to the engine. It was puffing and the smoke was flying. My attention was called by my little boy six years old. He said it was puffing out a good many sparks. He says, 'Papa, let's see the fire,' and I stopped there a few minutes. I stood there, and then drove on to town." Again he said, on the same subject, in response to a question as to how high the sparks were going: "They seemed to be going up pretty good height. Q. What quantity? A. They seemed to me an unusual quantity. That is why it attracted my attention and the little boy's. Q. What size were the sparks? A. They seemed to be a good size, about as big as the end of your thumb." The nearest point that the engine came to the car that was burned was 154 feet. The night was calm, with some snow on the ground, and it is argued with great force by counsel for appellant that it was a physical impossibility for the sparks from the engine to have ignited the car. It seems to us, however, this was a question properly for the jury. It is true the evidence conduced to show that the engines were fitted with lawful spark arresters, but this may not have been credited by the jury, who were, after all, the arbiters of the facts; and, taking the testimony on this branch of the case as a whole, we are not able to say there was no evidence from which the jury would be warranted in concluding that the fire was caused by sparks from the engines hauling appellant's freight train, and if these sparks were as big

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as the end of a man's thumb, as testified to by Lawrence Rogers, this would show the spark arresters were not in good condition.

The court overruled all the instructions offered by the appellant, and gave the following of his own motion: "(1) You are instructed that if you believe from the evidence in this case that on February 20, 1903, the box car of the defendant was burned from sparks from defendant's engine by reason of the negligence of defendant in the construction or management of one of its engines, or the negligence of defendant in permitting said box car to remain open, if such was its condition, or in permitting it in such condition to remain at the point on the side track where it was burned, and that from said box car the wareroom of the plaintiff caught fire and the said machinery of plaintiff was thereby burned up and destroyed, and that it was the natural and probable consequence, then you will find for the plaintiff such compensatory damages as you believe from the evidence he has sustained by reason of the burning of said machinery, in a sum not exceeding \$1,875.44; otherwise, you will find for the defendant. (2) You are further instructed that, although you may believe from the evidence in this case that the box car was set on fire by reason of sparks escaping from one of the engines of defendant on February 20, 1903, from which car the wareroom containing plaintiff's machinery caught fire, and thereby the said machinery was burned, yet if you further believe from the evidence that said engine was at the time provided with the best and most effectual spark arrester known to science and of practical use, properly adjusted, that would prevent as far as possible sparks escaping from the chimney of the engine, then you will find for the defendant, unless you further believe from the evidence that said engine was constructed or operated negligently and by reason thereof sparks escaped from it and set fire to said box car, or defendant negligently left open said car or negligently left it in that condition at the night on said track where it was burned. (3) If you find for the plaintiff in damages, then you will reduce such amount by the value of the old iron in the sum of \$40."

Instructions Nos. 1 and 2 are both subject to the criticism that they authorized the jury to find for the plaintiff if they believed that it was negligence in the appellant to leave its empty car open after it was unloaded, or that it was negligence to leave it on the track where it stood when burning, whether the fire originated from the sparks from the engine or not. The allegation of the petition on this subject is that the fire was caused by the negligence of appellant in allowing sparks of unusual size and quantity to escape from its engines, and thus ignite the car; but these instructions permitted appellee to recover if the jury reached the conclusion that the empty car should not have been left open, or should not have been left on the switch so near appellee's warehouse, although the fire may have originated by the negligence of some passer-by or by the act of an incendiary. It is not

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charged in the pleading that it was negligence to leave the car open, or that it was left dangerously close to appellee's warehouse. The instructions should have been limited to the alleged negligence of appellant in allowing sparks to escape from its engine. *L. & N. R. R. Co. v. McGarey's Adm'r*, 104 Ky. 509, 47 S. W. 440. Appellant was only liable if the fire which burned appellee's warehouse was caused by the ignition of the car from sparks produced by its engines. It is true, the petition alleges that after the car was in flames appellant, by the exercise of ordinary diligence, could have saved the warehouse; but this was denied, and there was no proof to sustain it, and the court properly ignored it in the instructions.

The court gave no definition of "negligence" or "diligence"; but, as an instruction as to these words was not requested by the appellant, the omission was not erroneous.

The court did not err in refusing instructions A, B, and C, offered by appellant. A. in so far as it properly enunciates the law, is contained in the instructions given. B and C, which are predicated upon the additional risk or hazard assumed by appellee in using a wareroom close to the switch of appellant, are unsound, as is held in the opinion of this court in the case of *C., N. O. & T. P. R. R. Co. v. Barker*, 94 Ky. 71, 21 S. W. 347, wherein the following excerpt from *Pierce on Railroads*, p. 435, is cited with approval: "A landowner's erection and use of a building for ordinary purposes near the track, although it is more exposed to fire than if it were at a greater distance, is not negligence."

As this case is to be retried, we deem it proper to say that the court erred in refusing to allow appellee to place in evidence the cinders found by him along the line of appellant's track. The defense was that the spark arresters were of the best type known to science and that all of the engines on the road had them; and it was further testified to by the employees of appellant that no cinder of more than a quarter of an inch in diameter could escape through the meshes of the spark arresters. It would seem, therefore, that the fact that there were cinders thrown out along the line of appellant's right of way, more than a quarter of an inch in diameter, would tend to refute this evidence.

For these reasons the judgment is reversed for proceedings consistent with this opinion.

ST. LOUIS, I. M. & S. RY. CO. *v.* DAWSON.

(Supreme Court of Arkansas, Jan. 13, 1906.)

[92 S. W. Rep. 27.]

Railroads—Fires—Cause—Evidence.*—Evidence that a building near a railroad right of way was discovered to be on fire a few minutes after an engine passed is sufficient, in the absence of any other explanation of the cause of the fire, to justify a finding that it was caused by sparks from the engine.

Same—Presumption of Negligence.†—Evidence that a fire was caused by sparks from a locomotive raised a presumption of negligence on the part of the railroad company.

Evidence—Opinion of Expert—Proper Operation of Locomotive.‡—In an action against a railroad company for damages from a fire alleged to have been caused by sparks from a locomotive, an experienced engineer may testify as an expert as to the proper manner of handling an engine when passing combustible material.

Railroads—Fires—Spark Arresters—Duty of Railroad Company.§—A railroad company is not absolutely bound to use the safest and best appliances to prevent the escape of sparks from its locomotives, but only to use reasonable care to supply the best and safest contrivances.

Appeal from Circuit Court, Jefferson County; Antonio B. Grace, Judge.

Action by S. W. Dawson against the St. Louis, Iron Mountain & Southern Railway Company. From a judgment for plaintiff. defendant appeals. Reversed.

B. S. Johnson, for appellant.

Taylor & Jones, for appellee.

*See foot-notes appended to *Toledo, St. L. & W. R. Co. v. Fenstermaker* (Ind.), 16 R. R. R. 855, 39 Am. & Eng. R. Cas., N. S., 855; *Gorham Mfg. Co. v. New York, etc., R. Co.* (R. I.), 16 R. R. R. 216, 39 Am. & Eng. R. Cas., N. S., 216; foot-notes appended to *Toledo, St. L. & W. R. Co. v. Parks* (Ind.), 15 R. R. R. 397, 38 Am. & Eng. R. Cas., N. S., 397.

†See foot-notes appended to *Norfolk & W. Ry. Co. v. Fritts* (Va.), 18 R. R. R. 246, 41 Am. & Eng. R. Cas., N. S., 246; foot-note appended to *Southern Ry. Co. v. Johnson*, 18 R. R. R. 162, 41 Am. & Eng. R. Cas., N. S., 162; *Fireman's Ins. Co. v. Seaboard Air Line Ry.* (N. Car.), 16 R. R. R. 808, 39 Am. & Eng. R. Cas., N. S., 808; foot-notes appended to *St. Louis, etc., Ry. Co. v. Coombs* (Ark.), 16 R. R. R. 480, 39 Am. & Eng. R. Cas., N. S., 480.

‡For the authorities in this series on the question of the admissibility of expert testimony and opinion evidence, see foot-note appended to *Denver & R. G. R. Co. v. Scott* (Colo.), 17 R. R. R. 309, 40 Am. & Eng. R. Cas., N. S., 309; *Macon Ry. & L. Co. v. Mason* (Ga.), 17 R. R. R. 201, 40 Am. & Eng. R. Cas., N. S., 201; *Birmingham Ry., L. & P. Co. v. Enslen* (Ala.), 17 R. R. R. 127, 40 Am. & Eng. R. Cas., N. S., 127; *German Ins. Co. v. Chicago, etc., Ry. Co.* (Iowa), 16 R. R. R. 494, 39 Am. & Eng. R. Cas., N. S., 494.

§See foot-notes appended to *St. Louis, etc., Ry. Co. v. Coombs* (Ark.), 16 R. R. R. 480, 39 Am. & Eng. R. Cas., N. S., 480; foot-notes appended to *Bottoms v. Seaboard Air Line Ry.* (N. Car.), 15 R. R. R. 443, 38 Am. & Eng. R. Cas., N. S., 443.

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McCULLOCH, J. This is an action against the railway company to recover damages caused by destruction by fire of plaintiff's property, a lot of seed cotton stored in a house near the railroad track.

It is contended that the verdict is not sustained by the evidence. The facts are similar to those in *St. L., I. M. & S. Ry. Co. v. Coombes* (Ark.) 88 S. W. 595, and the principles of law announced in that case are controlling in this.

The plaintiff introduced testimony tending to show that the house containing the cotton was discovered to be on fire a few minutes after the engine passed, and that there was no other evidence to explain the origin of the fire. The jury were justified, therefore, in finding that the fire was caused by sparks from the engine, which raised a presumption of negligence and placed upon the defendant the onus of exonerating itself. *St. L., I. M. & S. Ry. Co. v. Coombes*, supra. It is not required that the evidence should exclude all possibility of another origin, or that it be undisputed. It is sufficient if all the facts and circumstances in evidence fairly warrant the conclusion that the fire did not originate from some other cause. *Crist v. Erie Ry. Co.*, 58 N. Y. 638.

The testimony was conflicting as to whether defendant was guilty of negligence in failing to provide proper appliances to prevent the escape of sparks, or in failing to operate the engine with due care. We cannot say that the proof was insufficient to warrant a finding of negligence on the part of appellant.

It is claimed that the court erred in permitting a witness introduced by the plaintiff to state his opinion as to the duty of a railroad engineer in the exercise of due care in handling an engine when passing combustible matter. The witness was shown to have been a practical engineer who was qualified by experience to testify on the subject. This was not erroneous. The inquiry was as to whether the engineer was guilty of negligence in the operation of his engine, which is alleged to have caused the fire, and it was competent to show by opinions of men experienced in the operation of railroad locomotives the manner in which the same should be properly operated in order to prevent the omission of sparks when passing combustible matter. The court removed all possible prejudice improperly resulting from this evidence, by giving the following instruction asked by defendant: "The court instructs the jury that, unless it is shown from the evidence that the engineer in charge of said train knew, or in the exercise of ordinary care should have known, that there was stored in the said cotton house loose cotton or other highly inflammable material, it was not his duty to shut off his steam in approaching or passing that part of the track along which said house was situated, and he was guilty of no negligence in failing so to do."

The court gave the following instruction, over the objection of the defendant, and the giving of the same is assigned as

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error, viz.: "The court instructs the jury that railway companies, being authorized by law to use steam in the operation of their trains, are bound to use locomotive engines which are of the safest construction for protection against the communication of fire therefrom to property along the lines of their roads, and to supply them with the best approved appliances and contrivances used to prevent the escape of sparks and coals therefrom to the endangering of the property of others, and to use them upon the road with such care and diligence as would be exercised by skillful, prudent, and discreet persons having the control and management of them, and a proper desire to avoid injury to the property along the road. The failure to use such locomotive appliances and contrivances, and such care and diligence, on the part of the companies, will be negligence, and will subject them to recovery for damages occasioned thereby, provided they occur without the contributory negligence of the owner of the property injured or destroyed." The objection urged against this instruction is that it imposes upon the railroad company the absolute duty of supplying its locomotives with the best approved appliances in use to prevent the escape of sparks, instead of only exercising reasonable care in providing such appliances. The objection is well founded.

A railway company is, by its charter, vested with a right to operate its railroad, and is not an insurer of property along or near the line of its road, nor of the safety and perfection of the appliances adopted to prevent the escape of fire from its engines. Its duty is merely to exercise reasonable care to provide the best and safest approved contrivances in use to prevent the escape of fire, and is only liable for a negligent failure in this respect. There may be several different kinds of such contrivances in use by railway companies, and there may be an honest difference of opinion among those competent to judge of the matter, as to which is the best and safest. It is conceded by all that none of such appliances will absolutely prevent the escape of sparks under all circumstances. The railway company is only bound to exercise reasonable care in the selection of such approved appliances from those in use, and is not necessarily guilty of negligence because the kind selected proves in the end not to be the best. Of course, it is competent to show what is the best in order to establish the fact whether or not there has been negligence in making the selection, but it does not necessarily follow, as a matter of law, that the failure to select the best established negligence. *St. L., I. M. & S. Ry. Co. v. Coombes*, supra; *Lesser Cot. Co. v. St. L., I. M. & S. Ry. Co.*, 114 Fed. 133, 52 C. C. A. 95; *Rosen v. Railroad Co.*, 83 Fed. 300, 27 C. C. A. 534; *Hagan v. Railroad Co.*, 86 Mich. 615, 4 N. W. 509; *Flinn v. N. Y., etc., Ry. Co.*, 142 N. Y. 11, 36 N. E. 1046; 3 Elliott on Railroads, p. 1898.

We are therefore of the opinion that the giving of this in-

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struction was erroneous. It is true the instruction follows the language used by this court in *Railway Company v. Fire Association*, 55 Ark. 163, 18 S. W. 43, but in that case an instruction of the trial court was not under discussion, and the effect of the evidence in support of the charge of negligence was being discussed. The language used therein was a statement in general terms of the duty of the company to exercise care in the construction and operation of its trains; it being shown by the undisputed evidence in that case that the locomotive from which the fire escaped was in bad condition, and was provided with no contrivances for the prevention of the escape of sparks. The question now presented in the case at bar was not before the court in that case, and was not discussed in the opinion. The language used in that case, with reference to the undisputed facts therein, was not applicable in this case as an instruction to the jury upon the conflicting testimony introduced. It was in conflict with the instructions on the subject given at the instance of the defendant, and was calculated to mislead the jury. *Railway v. Aven*, 61 Ark. 155, 32 S. W. 500; *Fordyce v. Edwards*, 65 Ark. 101, 44 S. W. 1034; *Goodell v. Bluff City Lumber Co.*, 57 Ark. 203, 21 S. W. 104; *Fletcher v. Eagle*, 74 Ark. —, 86 S. W. 810; *St. L. & N. Ark. Ry. Co. v. Midkiff*, 74 Ark. —, 87 S. W. 446.

For the error in giving this instruction, the judgment is reversed, and the cause remanded for a new trial.

KOCH v. SOUTHERN CALIFORNIA RY. CO.

(Supreme Court of California, Feb. 10, 1906.)

[84 Pac. Rep. 176.]

Railroads—Accident at Crossing—Contributory Negligence.*—A person who drives rapidly over a railroad crossing without looking at all for an approaching train, or taking any precautions as to his own safety, is negligent, though the gates at the crossing are open.

Beatty, C. J., dissenting.

In Bank. Appeal from Superior Court, Los Angeles County; M. T. Allen, Judge.

Action by John Koch against the Southern California Railway Company. From a judgment for defendant, plaintiff appeals. Affirmed.

*For the authorities in this series on the subject of the care required of a highway traveler before attempting to cross railroad tracks as affected by fact that crossing gates are open, see foot-notes appended to *Chicago, etc., R. Co. v. Schmitz* (Ill.), 18 R. R. R. 214, 41 Am. & Eng. R. Cas., N. S., 214; foot-note appended to *Stegner v. Chicago, etc., Ry. Co.* (Minn.), 17 R. R. R. 365, 40 Am. & Eng. R. Cas., N. S., 365; *Van Riper v. New York, etc., R. Co.* (N. J.), 14 R. R. R. 162, 37 Am. & Eng. R. Cas., N. S., 162.

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Edward F. Wehrle and Anderson & Anderson, for appellant.
C. N. Sterry, T. J. Norton, Paul Burks, and E. E. Millikin, for respondent.

HENSHAW, J. Plaintiff sued to recover damages for personal injuries occasioned him by reason of the alleged negligence of the defendant in so operating its trains that plaintiff was struck by one of them at the crossing of a street in the city of Pasadena. The negligence charged was the omission upon the part of the defendant company to sound the bell and to close the gates maintained at the crossing at the time of the approach of the train. Upon the taking of all the testimony the court instructed the jury to find a verdict for defendant, which the jury did, and the court's ruling in this regard is the subject of this appeal.

The consideration of the question necessitates the presentation of the evidence, which is here given, as favorably to the plaintiff as the facts warrant. Plaintiff, about 10 o'clock at night, was driving two horses attached to a light spring wagon toward the railroad track at a gait which he describes as "a pretty fair trot" and which others describe as a "brisk trot." Colorado street, upon which he was driving, is 75 feet wide with an electric railroad track running along it a little south of the middle of the street. The sidewalk on the south side of the street is 11 feet wide. An alley 30 feet wide crosses Colorado street at right angles, and defendant's railroad track also crosses the street in the center of that alley. The train which struck plaintiff's spring wagon consisted of a locomotive, 13 loaded freight cars and a caboose. It came from the south through this alley up a steep grade at a speed of about 4 miles an hour, and having come almost to a standstill at a station just beyond, the engine was laboring heavily to get under way on the up grade and "was puffing very hard with a loud exhaust." There was evidence tending to show that the engine bell and the whistle were silent, and it will be assumed that they were. There were gates across the street on each side of the railroad track, and these gates were not closed as the train crossed the street. Colorado street was paved with asphalt and plaintiff's horses were newly shod with smooth shoes. He approached the track of defendant without checking the speed of his horses and "looking straight ahead." He says he could not see or hear the train, and first saw it when the noses of his horses were about on the railroad track. According to the map or plat of the locality found in the record, as well as according to the undisputed evidence of witnesses, the buildings in the vicinity were so disposed that, if the plaintiff had been on the alert and driving with reasonable caution, he might have caught sight of the approaching train in ample time to have avoided the accident. Plaintiff was, and had been for six years, familiar with the crossing, but he took no precautions whatever before driving upon it. He did not stop. He did not slow up. He did not look. He did not listen. The

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clattering of his horses' feet and the noise of his wagon would certainly have interfered with his hearing the approaching train. He was moving faster than the train and failed to take any precautions by slowing up to listen, but had he been on the alert he could have heard and seen the train in time to have avoided the accident. It is difficult to understand, then, how he could have come into collision with this slow-moving locomotive, excepting that he either absent-mindedly or recklessly approached and drove on the track. Indeed, from his own testimony, it is plain that he approached the crossing with a total disregard of its dangers. In substantiation of this is his statement to one of the witnesses, which is not denied, that "My main idea was to get home. I was not paying any attention to anything." Under the facts, then, the plaintiff, after accepting the invitation to proceed, extended to him by the open gates, used no precaution whatsoever, did absolutely nothing for his own protection and safety. He did not lessen the speed of his horses; he did not listen for the approach of the train, which was made audible to others some time before he drew near the crossing; he did not look for the train, as he, himself, testifies he kept his eyes straight ahead; and the first intimation he had of its approach was when his horses shied away from the engine.

The case thus presented is not one as to the degree or amount of care which should be exercised by one about to cross a railroad under the invitation to proceed given by the open gates, but whether under such circumstances a man may fail or decline to exercise any care whatsoever, treating the open gates as a positive assurance of safety. Of course, in any case such as this, where it is shown that a plaintiff has exercised some care, the question whether or not the care actually exercised was due and sufficient, will always be a matter for determination by the jury. But where, as here, the unconflicting evidence shows that he exercised no care whatsoever, it becomes a question of law to say whether or not such a plaintiff's case shall be submitted to the jury. If it is so submitted, it can only be upon the theory that the open gates were an absolute warranty of safety, justifying the plaintiff in proceeding without any heed or caution. It is for this proposition that appellant contends. But such we do not understand to be the law. A railway crossing is, itself, a place of danger and is an effectual warning of danger, a warning which must always be heeded, and the exercise of ordinary care in traveling over such a place is not excused by the negligent omission of the railway company, itself, to exercise reasonable care. *Green v. Southern California Ry. Co.*, 138 Cal. 1, 70 Pac. 926; *Herbert v. Southern Pacific Company*, 121 Cal. 227, 53 Pac. 651; *Lambert v. Southern Pacific Company*, 79 Pac. 873. Nor is it the law that when a railroad company adopts safety gates or any other appliance for the protection of the public, the public is thereby ab-

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solved from all duty of taking care of itself. A person is still required to exercise due and ordinary care, and while the quantum of care which will be reasonable may be less where the gates are provided and are relied upon by the traveler, still the gates, themselves, are not an assurance and a warranty such as to justify a traveler in going blindly ahead in total disregard of all ordinary precautions, as did the plaintiff in this instance. *Greenwood v. Philadelphia, etc.*, 124 Pa. 572, 17 Atl. 188, 3 L. R. A. 44, 10 Am. St. Rep. 614; *Rangleley's Adm'r v. Southern R. R. Co.*, 95 Va. 715, 30 S. E. 386; *Pennsylvania, etc., v. Pfuelb*, 60 N. J. Law, 278, 37 Atl. 1100; *Dawe v. Flint, & P. M. R. Co.*, 102 Mich. 307, 60 N. W. 838; *Romeo v. Boston, etc.*, 87 Me. 540, 33 Alt. 24; *Thompson, Negligence*, § 1614.

The case of *Ellis v. Boston, etc.*, 169 Mass. 600, 48 N. E. 839, contains a critical review of the matter, and it is said: "The raising of the gates was, no doubt, a circumstance which justified the plaintiff in starting to cross the railroad when he did, and he had a right to expect that, if any engine or train was approaching the crossing on the inbound track, a whistle would be sounded or a bell be rung. But, in attempting to cross the railroad, he was bound, in the exercise of ordinary care, to himself exercise his own powers of observation, and to take thought for his own safety; and he was not entitled to have his case go to the jury unless there was evidence from which it could be inferred that he did this. No such inference can be drawn either from his own testimony or that of the other witnesses. The general rule that one who attempts to cross a railroad track must reasonably use his own powers of observation to assure himself that there is no danger from approaching trains is clear. *Chase v. Railroad Co.*, 167 Mass. 383, 45 N. E. 911, and cases cited. And the rule applies to one from whom a train approaching upon a second track is hidden by a train which has just passed. *Bancroft v. Railroad*, 97 Mass. 275; *Winslow v. Railroad*, 165 Mass. 264, 42 N. E. 1133. While the raising of the gates justified the plaintiff in attempting to cross when he did, and while that fact and the facts that no whistle was sounded and no bell was rung are to be taken into consideration on the question of how much he must himself look and observe as he makes his way across, these circumstances do not excuse him from looking and listening and taking thought for his own safety. He cannot rely wholly upon them, and cannot recover without showing more, as to his own conduct, than that he so relied. *Butterfield v. Railroad Co.*, 10 Allen, 532, 87 Am. Dec. 678; *Merrigan v. Railroad*, 154 Mass. 189, 28 N. E. 149; *Tyler v. Railroad Co.*, 157 Mass. 336, 32 N. E. 227. We are of opinion that, as matter of law, there was no evidence from which it could be found that the plaintiff himself exercised due care, and the verdict for defendant was rightly ordered. Exceptions overruled."

Excepting for the presence of gates, this case is parallel in

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its facts with *Hager v. Southern Pacific Co.*, 98 Cal. 309, 33 Pac. 119; but, as has been said, the presence of gates does not justify the total indifference and disregard to danger which was evinced by plaintiff in this case.

The judgment appealed from is therefore affirmed.

We concur: MCFARLAND, J.; LORIGAN, J.; ANGELLOTTI, J.; SHAW, J.

FINNICK v. BOSTON & N. ST. RY.

(Supreme Judicial Court of Massachusetts, Middlesex, Feb. 28, 1906.)

[77 N. E. Rep. 500.]

Street Railroads—Injuries to Traveler—Negligence—Evidence—Sufficiency.—Evidence in an action against a street railway company for injuries received by a person struck by a car examined, and held to justify a finding of actionable negligence on the part of the company.

Same—Contributory Negligence—Question for Jury.—Evidence in an action against a street railway company for injuries received by a person struck by a car examined, and held to justify a finding that the person was not guilty of contributory negligence.

Same—Obligation to Exercise Care.*—A person approaching a street car track is not bound by any strict rule of law to stop and look and listen as on approaching a railroad crossing; but he must use the degree of care which an ordinarily prudent man would exercise under similar circumstances.

Exceptions from Superior Court, Middlesex County; Wm. C. Wait, Judge.

Action by one Finnick against the Boston & Southern Street Railway. There was a verdict for plaintiff, and defendant brings exceptions. Overruled.

*For the authorities in this series on the question whether the stop, look, and listen rule is applicable to street railway crossings, see foot-notes appended to *Marden v. Portsmouth, etc., St. Ry. (Me.)*, 17 R. R. R. 821, 40 Am. & Eng. R. Cas., N. S., 821; *Markowitz v. Metropolitan St. Ry. Co. (Mo.)*, 16 R. R. R. 838, 39 Am. & Eng. R. Cas., N. S., 838; foot-notes appended to *Los Angeles Traction Co. v. Conneally (C. C. A.)*, 16 R. R. R. 107, 39 Am. & Eng. R. Cas., N. S., 107; foot-notes appended to *Vrooman v. North Jersey St. Ry. Co. (N. J.)*, 15 R. R. R. 393, 38 Am. & Eng. R. Cas., N. S., 393; foot-notes appended to *Giardina v. St. Louis & M. R. Ry. Co. (Mo.)*, 14 R. R. R. 579, 37 Am. & Eng. R. Cas., N. S., 579.

For the authorities in this series on the subject of the care required of those driving other vehicles in streets upon which street cars are operated, see foot-notes appended to *Ablard v. Detroit United Ry. (Mich.)*, 18 R. R. R. 722, 41 Am. & Eng. R. Cas., N. S., 722; *Ridley v. Mobile & O. R. Co. (Tenn.)*, 17 R. R. R. 857, 40 Am. & Eng. R. Cas., N. S., 857; foot-notes appended to *Marden v. Portsmouth, etc., St. Ry. (Me.)*, 17 R. R. R. 821, 40 Am. & Eng. R. Cas., N. S., 821; *Riley v. Shreveport Traction Co. (La.)*, 16 R. R. R. 785, 39 Am. & Eng. R. Cas., N. S., 785; *Wood v. Boston Elevated Ry. Co. (Mass.)*, 16 R. R. R. 475, 39 Am. & Eng. R. Cas., N. S., 475.

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John J. & W. A. Hogan, for plaintiff.

Foster & Turner and Richardson, Trull & Wier, for defendant.

LORING, J. The plaintiff, a milkman, was delivering milk on his regular route about half past 4 in the morning of April 15, 1904, when he was injured by being run into from behind by a special car of the defendant. The accident happened on Gorham street, in the city of Lowell, just north of Cosgrove street, which runs at right angles to Gorham street. The plaintiff, who had been delivering milk in Cosgrove street, drove in an easterly direction down Cosgrove to Gorham, and turned into Gorham to drive north to Anderson street, a street leading out of Gorham street on the same side as Cosgrove street. Gorham street was 40 feet wide between the curbstones. In the center there was a double track of the defendant company, and the space between the easterly track and the east curbstone was 10½ feet. As the plaintiff swung into Gorham street his high wheels "went over" between the rails of the easterly track of the defendant. The plaintiff testified "that as he drove his horse and wagon easterly out of the tracks to get into the space between the easterly curbstone of the street and the easterly rail of the defendant, and before his hind wheel had left the rail, the car of the defendant going northerly struck his team when about 60 feet from Cosgrove street." He was thrown from his seat to the ground, the wagon was pushed along Gorham street about 20 feet after it was struck by the car, up against a post, and came to a stop about 100 feet beyond the post. The plaintiff also testified that he had driven over the milk route for 10 years, never had seen a car go by "there" at the hour in question during that time, and that the time for the first regular car was 10 minutes after 5. He admitted that "he did not look in any direction for a car, or listen for a car, or think anything about a car as he drove up Cosgrove street and onto Gorham street"; that at the time of the accident it was not daylight, but gloom; and that "at no time before his wagon was struck by the car did he hear any gong strike, or hear any notice or warning of any kind from the men who had control of the car." The defendant introduced evidence that the car was a special car which had been to Billerica and was on its way back; that it was going 10 or 12 miles an hour; that the plaintiff's wagon was seen by the motorman when the car was "about 50 feet from the southerly line of Cosgrove street"; that at the time the horse "was just turning from Cosgrove to Gorham street"; that "he applied the brake and the reverse, but before he could bring the car to a stop it struck the hind wheel of the plaintiff's wagon; that a bright electric headlight threw a pencil of light about 8 feet in width and confined to the track for a distance of about 1,000 feet, and which shut out the motorman's view of objects outside the ray of said pencil." The defendant also introduced evidence of

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snow plows and sand cars which ran over the tracks between 11:20 p. m. and 5:10 a. m.

At the close of the evidence the defendant asked for a verdict, as matter of law. This was refused, and the defendant took an exception. The presiding judge instructed the jury that "a person in approaching a street railway track is not bound by any strict rule of law, as when he approaches a steam railroad crossing, to stop and look and listen, or to take special precautions in order to determine whether there is danger to him in going upon the tracks; but, while the law does not say that he must stop and look and listen, it does say that he must use the degree of care which an ordinarily prudent and careful person would exercise, placed in the same position, and it is for you to say whether, upon the evidence in this case, the plaintiff has produced a fair preponderance of testimony to show that he was acting, when he turned from the side street out upon Gorham street and drove along Gorham street, with a degree of care which a reasonably prudent and careful person would exercise." To this instruction the defendant excepted. The case is here on these exceptions.

1. In its argument that there was no evidence of negligence on the part of the defendant, the defendant has assumed that the car was going 10 or 12 miles an hour. But that assumption is not warranted. The jury were not bound to believe the testimony of the defendant's witnesses. If they believed (as they were warranted in believing on the evidence) that the wagon was struck 60 feet north of Cosgrove street and was pushed along Gorham street about 20 feet after it was struck by the car and up against a post, and that the car did not stop until it was about 100 feet beyond the post, although the brake and the reverse were applied when the car was 50 feet south of the southerly line of Cosgrove street, they could find that the car was going must faster than 12 miles an hour. In considering whether the defendant was guilty of negligence, the jury could consider that the motorman testified that his electric headlight threw a pencil of light 8 feet wide which shut out the motorman's view, and yet he was running his car at the high rate of speed indicated by what occurred, and without sounding his gong at cross streets, when persons using such streets would not ordinarily expect a car to be on the track. We are of opinion that they were justified in finding that the defendant was negligent.

2. The difference between the case at bar and the Massachusetts cases cited by the defendant (*Hall v. West End Street Railway*, 168 Mass. 461, 47 N. E. 124; *Kelly v. Wakefield & Stoneham Street Railway*, 175 Mass. 331, 56 N. E. 285; *Hurley v. West End Street Railway*, 180 Mass. 370, 62 N. E. 263; *Dooley v. Greenfield & Turners Falls Street Railway*, 184 Mass. 204, 68 N. E. 203; *Gleason v. Worcester Consolidated Street Railway*, 184 Mass. 290, 68 N. E. 225; *Dunn v. Old Colony Street Railway*, 186 Mass. 316, 71 N. E. 557; *Black v. Boston*

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Elevated Street Railway, 187 Mass. 172, 72 N. E. 970, 68 L. R. A. 799; Saltman v. Boston Elevated Railway, 187 Mass. 243, 72 N. E. 950; Seele v. Boston & Northern Street Railway, 187 Mass. 248, 72 N. E. 971) in support of its contention that, as matter of law, the plaintiff was guilty of contributory negligence. is that in those cases the accident happened at a time when cars were to be expected to be running on the tracks in question. In addition, the defendant has cited the case of Butler v. Rockland, Thomaston & Camden Street Railway, 99 Me. 149, 58 Atl. 775. 105 Am. St. Rep. 267. The plaintiff in that case was struck by a train of lime rock cars, and it is stated in the opinion that "it appears that the plaintiff knew that the defendant was running limerock cars" in addition to the passenger cars on its schedule. We do not know how far the court intended to go by this further statement in that opinion: "And in any event the defendant had the right to run cars when it chose, and it was the duty of the plaintiff to exercise some care to look out for them."

3. The defendant has argued that the presiding judge was wrong in telling the jury that "a person in approaching a street railway track is not bound by any strict rule of law, as when he approaches a steam railroad crossing, to stop and look and listen, or to take special precautions in order to determine whether there is danger to him in going upon the tracks." The distinction between the two is settled in this commonwealth. Robbins v. Springfield Street Railway, 165 Mass. 30, 42 N. E. 334; Hall v. West End Street Railway, 168 Mass. 461, 462, 47 N. E. 124; Donovan v. Lynn & Boston Street Railway, 185 Mass. 533, 535, 70 N. E. 1029.

Exceptions overruled.

ST. LOUIS & S. F. R. CO. v. CHAPMAN.

(Circuit Court of Appeals, Eighth Circuit, July 14, 1905.)

[140 Fed. Rep. 129.]

Railroads—Injury of Person at Crossing—Presumption of Negligence.*—The fact alone that a person who was walking is found dead beneath a railroad engine at a grade crossing raises no presumption that those operating the engine were negligent or in fault for the killing, and the burden rests upon one alleging such negligence to prove the same.

Same—Contributory Negligence.—On the arrival of a regular passenger train at a division station in the night, it was the custom of the railroad company to detach the engine and run it ahead across a street crossing the tracks near the station, and to bring it back on another track on its way to the roundhouse, while, at the same time, another engine, which was in waiting across the street, was

*For the authorities in this series on the question whether a presumption of negligence arises from the fact of a collision between a car or train and a person on a railroad track, see foot-notes appended to Hot Springs St. Ry. Co. v. Hildreth (Ark.), 18 R. R. R. 168, 41 Am. & Eng. R. Cas., N. S., 168.

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backed up and attached to the train. The company did not maintain a watchman at the crossing in the night, and there was no electric light over it. Plaintiff's intestate, who was a man 45 years old and accustomed to taking such train, and presumably familiar with such facts and customs, started to go over the tracks at the crossing, which were six in number, after the train came in, and was struck and killed by the detached engine, which backed up a short distance behind the other engine and on an adjoining track. The space between the two tracks, some nine feet, was planked, and deceased was seen standing in such space when the forward engine passed. The engines carried no lights at the rear of the tenders, but both bells were being rung automatically. No one saw the deceased struck. Held that, under the facts and circumstances shown, deceased was chargeable, with contributory negligence, which precluded a recovery from the railroad company for his death.

Same—Presumption of Care.†—The doctrine that a person is presumed to have exercised due care to protect himself from injury, if applicable at all in the case of a person who goes upon a railroad crossing at night, where there is known danger from moving engines on the tracks, is only so in the absence of any testimony explanatory of his conduct at the time and of the manner of his injury.

In Error to the Circuit Court of the United States for the District of Kansas.

This is an action by the administratrix, the widow, of Charles S. Chapman, to recover damages for his death, alleged to have been caused by the negligent act of the plaintiff in error, the St. Louis & San Francisco Railroad Company. The case was tried to a jury, which returned a verdict of \$8,000 in favor of the defendant in error. The accident occurred on the 15th day of January, 1902, at the intersection of Wall street with the tracks of the railroad company in the city of Ft. Scott, Kan., approximately between 2:40 and 3 o'clock in the morning. The imputed grounds of negligence on the part of the railroad company were in backing its engine across said Wall street from the south, northward, without any light on the tender or back part of the engine, and without any light anywhere on said engine that could be seen by a person approaching said crossing from the west, and without any brakeman, or switchman, or guard, or lookout of any kind on said engine. The answer tendered the general issue, with a plea of contributory negligence.

The deceased was 45 years old, a strong and intelligent man. The evidence tended to show that he was well acquainted with the crossing of the tracks of the railroad company over said Wall street, and that his business for years past frequently took him from his home in Pittsburg, Kan., to and through Ft. Scott, and that he was in the habit of taking passage on the train in question,

†For the authorities in this series on the question whether there is a presumption of the exercise of due care by a person killed by a train, see foot-notes appended to *Miller v. Boston & Maine R. R.* (N. H.), 17 R. R. R. 564, 40 Am. & Eng. R. Cas., N. S., 564; foot-notes appended to *Rollins v. Chicago, M. & St. R. Ry. Co.* (C. C. A.), 17 R. R. R. 291, 40 Am. & Eng. R. Cas., N. S., 291; foot-notes appended to *Woolf v. Washington Ry. & Nav. Co.* (Wash.), 16 R. R. R. 846, 39 Am. & Eng. R. Cas., N. S., 846.

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due to arrive at that hour of the night. He arrived at Ft. Scott the evening prior to the accident, and went to the Tremont hotel located on Wall street, three blocks west of the railroad, as was his custom, where he waited the arrival of said train coming from the north, and walked therefrom direct toward the depot station, carrying two hand grips or satchels. Wall street runs east and west, crossing the tracks, which run north and south, about 160 feet south of the passenger station. After he left the hotel, walking east upon the south sidewalk on Wall street, and just before reaching the railroad, he passed in front of the Kennedy Block, close to the westernmost track of the railroad. In front of this hotel was a small incandescent electric light. Wall street is about 75 feet in width, with a street car track in the center thereof. The sidewalks on the street cross six tracks of the railroad company in going to the depot, the easternmost of which is the main track, called by some of the witnesses the "new belt track." The next track to it on the west is called the "coach track," or "passing track." The accident occurred on the latter track. The distance between the two tracks was about 9.4 feet, leaving a 5 or 6 foot space between trains passing on them. This space where the accident occurred was planked, and used by passengers when trains were on both tracks. Immediately east of the main line of the railroad, on the south side of Wall street, about 120 feet from and east of the Kennedy Block, was a brick block, in front of which there was a small arc light, about 20 feet from the east track. Directly north of that block, on the north side of Wall street, and close to the main line, was the passenger station, in front of which was another electric light. During the day, and until 10 o'clock at night, there was a gateman at the crossing to let up and down the bars, indicating the presence or absence of trains; but there was never any such watchman after 10 o'clock at night.

A short time before Chapman started to the station a passenger train of the railroad came in from the north, and was standing on the main track in front of the station, which had in it the usual lights. That train was to go on south; and, as Ft. Scott was a division point, engines were regularly changed there. As soon as the train stopped, a switchman would uncouple the engine, standing close to Wall street on the north side, which would then be run south across the street to a switch which took it from the main track westerly over upon the coach track, on which it was to proceed north to the roundhouse. Before said train came in, as was the usual custom, the engine known in the evidence as "No. 236," which was to pull the train on south, had moved south across Wall street, and was stationed on a spur which ran out of the main track on the east side, called "cement spur." The engine which brought the train in is known in the evidence as "No. 98." As soon as it had been uncoupled and went south past the cement spur, the fireman of engine 236, with his lighted lantern in hand, dismounted therefrom and, walking north a

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short distance to the cement spur, about 20 or 30 feet south of Wall street, threw the switch, so that the engine would move into the main track, and signaled the engineer to back up north to be coupled to the passenger train. The engine, on his signal, moved north to and over said walk, partly across Wall street, stopping about the middle thereof, with the engineer in the cab on the west side, with his head out looking northward. The fireman then walked back south and threw the switch again for the main line. Engine 98, in the meantime, had moved south about 500 feet from Wall street, where it was switched upon the coach track, which was thrown by the switchman, Baughman, who, after replacing the switch, mounted the engine as it moved north, riding in the gangway (the opening between the cab and the tender), in his customary place, on the west side. Both engines were lighted in front with electric lights, and there were small lights in each engine cab, with lanterns; and the bells on each of said engines, which rang automatically, were ringing during all of these movements.

Mr. Chapman was seen by a witness passing the Kennedy Block, walking along the south sidewalk on Wall street in the direction of the station. He had reached a point between the main track, on which engine 236 was moving, and the next track, on which engine 98 was moving, and was standing there when engine 236 moved by him going north. That engine passed him and stopped with its front about the middle of the street, which brought the north end of the tender near the train to which it was to be coupled. Engine 98, moving in the same direction on the coach track, was following engine 236, but did not reach Wall street until engine 236 had passed the south sidewalk. No one on engine 98 saw any one on the track in Wall street, though they were looking ahead. The motion of the tender led them to suspect that something was wrong about it, when the engineer stopped his engine in the street; and, on investigation, Mr. Chapman's body was found between the driving wheels on the east side of engine 8, and his grips were on the planks between the main and coach tracks, between the south sidewalk on Wall street and the street car track, near the point where the engineer on 236 saw him just a few minutes before, and his hat lay near the grip sacks. The night was quite dark. There was no light or watchman on the tender of either engine as they backed across the street. The engines moved slowly across the street.

Errors are assigned to certain portions of the charge delivered by the court to the jury, and to its refusal to direct a verdict for the defendant.

I. P. Dana and James Black (J. G. Egan, L. F. Parker, and W. F. Evans, on the brief), for plaintiff in error.

Morris Cliggitt (J. I. Sheppard, on the brief), for defendant in error.

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Before SANBORN and VAN DEVANTER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge, after stating the case as above, delivered the opinion of the court.

When a person found dead beneath a moving engine of a railroad, along its ordinary right of way, no presumption arises that his death was occasioned by the culpable negligence of those operating the engine. The presumption is that the operators were without fault, and the burden throughout rests upon him who asserts the contrary to establish it by satisfactory proofs. Nothing can be inferred from the bare fact that a foot passenger is knocked down by a carriage in a place where they have an equal right to be, or by a train at a level crossing. Webb's Pollock or Torts, 545-547; Wakelin v. L. & S. W. R. Co., 12 App. Cas. 41.

While it may be conceded that, in so far as the general public was concerned, having occasion to use the Wall street crossing at the time and place of this accident, the city or the railroad company, or both, might have been derelict in considerate precaution in not maintaining an electric light, or some other assisting light, or a watchman, to warn parties of the passing of engines, yet in determining this case regard must be had to the duties of both the railroad company and Chapman, keeping in view the knowledge of each of the situation, the customary method of the movement of engines, and what would reasonably be expected of Chapman in approaching said crossing. On the one hand, the long-established practice of the railroad was not to maintain an arc light at said crossing, or a watchman there after 10 o'clock at night. It was also the long-established custom of the railroad company at that station, which was a division point, on the arrival of the train due at that time of night, to detach the engine drawing the incoming train, run it across the street down south, as the evidence shows, and back again over the street to the roundhouse, and simultaneously, or nearly so, therewith bring the engine in waiting across the street, to be attached to the train of cars standing at the station. These switching movements were conducted in the usual manner on the occasion in question. On the other hand, the evidence warrants the conclusion that the deceased was familiar with the general facts aforesaid. For a considerable period anterior to the accident he was in the habit, in going to and fro, of taking the train due to arrive and depart at the time and place in question. Frequently he would arrive at Ft. Scott at 8 or 9 o'clock in the evening from some other train, go to the same hotel, await the arrival of said train coming from the north, and then go to the depot to take the train for his home in Pittsburg, Kan. He was necessarily familiar with the location and the number of tracks, the changing of engines, and the method of switching them. He must have known that there was no arc light or watchman maintained at said crossing at that hour of the night; and, as the evidence shows, that such switching had hitherto uniformly been

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done without any light or watchman on the tender of such engines, such fact could not reasonably be presumed to have escaped his observation. With all this knowledge, he saw fit, as the evidence tends to show, to remain at his hotel until he barely had time to walk to the station to board the train before it would move out.

The obligation of the railroad company must be viewed in its relation to such a pedestrian attempting then and there to cross its tracks. He had no right to assume that the conduct of the business of the railroad company would be any wise different from what it had hitherto been. The dangers in approaching such a place were as much known to himself as to those in charge of the moving engines. The law of the land exacted of him a degree of circumspection and caution in approaching such a place, commensurate with the danger to be reasonably anticipated. If the night was so dark as to obscure his vision, the law all the more required of him to call into requisition his sense of hearing. In view of all the facts and circumstances in evidence, it challenges our comprehension how Chapman, a man of intelligence, with good sight and hearing, familiar with the situation, could have failed to be aware of the presence of said engines, if he was in the exercise of due care on his part. The very situation, of which he must have been conscious, was calculated to quicken his sense of alertness and excite his apprehension. The electric headlights on the engines were ablaze, which the evidence shows radiated on either side from 6 to 10 feet from the head of the engines, and widened as the distance in front increased. Why a person approaching said crossing, as did Chapman, who must have heard the bells ringing on the engines, if he was listening, could not have seen this radiating light from the engines, is inexplicable. The engineers in charge were complying with the statutory requirement by constantly keeping the bells ringing while the engines were in motion about said crossing.

It is a conspicuous fact that every other person who was found to have been going to the station at the same time, in approaching said crossing from the same side on which Chapman approached it, had his attention directed to the movements of these engines. The hackman, who approached the crossing about the time Chapman did, discovered the presence of these engines at said crossing in time to avoid collision with them. While he testified that he did not discover the presence of the engines until almost at them, as he was quite familiar with the custom of said switching programme, he would have been guilty of most culpable negligence had he gone against them without stopping his hack to take scrutinizing observation. Chapman was seen by one of the witnesses going toward the same station, going on the sidewalk from the Tremont House, in advance, in the same direction, immediately before the accident. It is quite immaterial, for the purpose of determining the movements and conduct of Chapman at

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the time, whether or not said witness was mistaken in stating that he saw the glow of the headlights in the engines as they approached the crossing. The fact remains that he did see the movements of the engines, and was aware of their approach to and over the crossing.

There is another uncontradicted and important fact disclosed in the evidence. The fireman on engine 236 testified that, with a lighted lantern, he threw the switch, when the engine was south of the street, to let engine 236 pass; that he then went to the sidewalk of Wall street with the lantern in his hand to take observation to see if any one was on or about the crossing. He then returned to the switch and gave the signal to the engineer of 236 to back up. After this engine passed the switch he was detained a short time on account of some disarrangement about the switch, and while so engaged engine 98 passed him going to the crossing, just behind engine 236. All this occurred while engine 98 was south of the crossing. The switchman was thus in the open, with his lighted lantern south of Wall street, while Chapman was approaching the intersection of the tracks. Chapman could not have looked without seeing these movements of the lantern. The very darkness rendered its light more distinct. He could not have been listening without hearing the ringing of the bells and the noise of the engines. If he neither saw the one nor heard the other, it was because he was heedless, and not taking the reckoning of the situation which his knowledge imperatively demanded of him.

The evidence furnishes little room for doubt that in his approach Chapman did not stop until he reached a point between the two tracks on the east side, the outer one on which engine 236 moved, and the next on which engine 98 approached. The space between the two tracks on the south side of Wall street was planked, used in case of two trains coming in there to transfer the baggage and passengers. If intended by Chapman to be used at the time in boarding the cars, he was familiar with its exact position. The position in which the grips he was carrying in either hand were found leaves no doubt that he stopped on this platform just before engine 236 passed. He was seen there by the engineer on 236 as his engine passed him. His very feet told him that they were pressing on the planked platform. As this platform left a space of nine feet between the rails of the two tracks, and five or six feet between passing engines, there was ample space for him to stand safely thereon. The testimony of the engineer on 236 was that he looked down on the man as he passed, standing about midway between the tracks, with his face toward his engine. How or why he got back so as to be struck by engine 98 is but matter of speculation. It is suggested in argument that, as quite a volume of steam was being emitted by the passing engine 236, Chapman may have stepped back to get out of it, and thus went too close to the rail on which engine 98 was coming. This is but a surmise, and not

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a fact proven directly or indirectly. But even if it was a fact, does it help the case of the defendant in error? It would show that Chapman was taking no heed of the approaching engine, with its bell ringing, when the evidence discloses a state of facts warranting the conclusion that he had reason to know that there were two engines moving simultaneously on the two approximate tracks. If, with his knowledge of the proximity of the two tracks, he thoughtlessly stepped back merely to get out of the steam, to which he had unnecessarily exposed himself, so as to collide with engine 98, is the railroad company to answer for the result? As said by Mr. Justice Field in *Little v. Hackett*, 116 U. S. 371, 6 Sup. Ct. 391, 393, 29 L. Ed. 652:

"That one cannot recover damages for an injury to the commission of which he has directly contributed is a rule of established law and a principle of common justice. And it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong."

The deceased voluntarily placed himself in a known place of danger, in which he could not escape the responsibility of looking out for the approach of both engines. He could but know, had he looked when he approached that platform, that neither engine had passed over the crossing, as their headlights would have notified him of the fact. "The law recognizes the track of an operated railroad as a place of danger, of which danger a view of the track conveys notice; and, when a person goes upon such track, or so near as to be within the overhang of the cars or engine, ordinary care requires that he be alert in the use of his senses of sight and hearing to guard himself from harm. And no reliance on the exercise of care by persons in control of the movement of trains or engines will excuse any lack of the exercise of such care by persons going upon such tracks. If the use of these senses is interfered with by obstructions or by noises, ordinary, reasonable care calls for proportionately increased vigilance." *Garlich v. Northern Pac. Ry. Co.*, 131 Fed. 839, 67 C. C. A. 237.

From his charge to the jury respecting the reciprocal duties of the railroad company and the pedestrian in the use of said crossing, it is apparent that the learned judge was impressed with the fact that the defendant in error had a very narrow margin on which to stand; and it is highly probable that an intelligent jury would have returned a verdict for the defendant below, but for the following portion of the charge:

"So far as shown by the evidence in this case there was no eye-witness to the accident resulting in the death of the deceased; no one to tell just how it happened. In such cases the law, out of regard to the natural instinct of self-preservation, presumes that at the time of the accident the deceased was exer-

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cising due care. Under such circumstances this presumption takes the place of and serves as evidence, and it is not overthrown by the mere fact of the injury. The burden rests upon the defendant to overcome this presumption. Consequently there is a presumption that deceased looked and listened for approaching engines before venturing upon the tracks, and adopted such other precautions as an ordinarily prudent and cautious man would have adopted under like circumstances."

If this doctrine of presumption has any applicability to a death occurring at such railroad crossing, in view of the positive cautious circumspection the law imposes upon a person approaching such place of recognized danger, its call to the attention of the jury in this instance was misleading. Such presumption can only apply in the absence of any testimony explanatory of the conduct of the person at the time and the manner of his injury. The evidence in this case practically traced Chapman from the time he left his hotel for the train until the moment almost of his death. It shows that he left the hotel for the train with his grips and his overcoat, wearing a stiff hat. A man going in that direction was observed by a witness going toward the station, as also by the hack driver. No other person was found to correspond with the movements of this man. And when his body was found under the engine there were present the two grips, the stiff hat, and overcoat to identify him. He was seen by the engineer on 236 just as it passed him, and his position was then defined. It was but a few seconds thereafter when he was struck by the engine. It was, therefore, palpably misleading under such a state of the facts to tell the jury that there was no eyewitness to the accident, and, because there was no one to tell just how it happened, the law presumes that at the time of the accident the deceased was exercising due care, and the burden was upon the defendant to overcome such presumption, and that there was a further presumption that the deceased looked and listened for approaching engines before venturing upon the tracks, and adopted the requisite precaution.

The verdict in this case cannot be sustained on this record without, in our opinion, ignoring the responsibility which the law affixes to the negligent act of the party injured contributing directly to the accident. The request made by the plaintiff in error for a direction to the jury to return a verdict for the defendant below should have been given.

The judgment of the Circuit Court must therefore be reversed, and the cause remanded, with directions for further proceedings in conformity with this opinion.

COLLIER *v.* GREAT NORTHERN RY. CO. *et al.*

(Supreme Court of Washington, Dec. 11, 1905.)

[82 Pac. Rep. 935.]

Railroads—Injuries—Defective Track—Tracks of Other Company.

—The mere fact that a railroad company, for the purpose of switching cars to and from its road, moved trains on the tracks of another road situated in a street, did not render the railroad company in question liable for injuries to a vehicle occasioned by its wheel dropping into a hole in the track of the other company.

Railroads—Pleading Ownership.—Where two railroad companies own tracks in a street, and in an action against one of them the complaint alleged in general terms that defendant operated trains in that street, and all the allegations were denied, except that defendant did operate trains in the street, the pleadings did not admit that defendant operated trains on the tracks belonging to the other company.

Appeal from Superior Court, King County; Arthur E. Griffin, Judge.

Action by Andrew Jackson Collier against the Great Northern Railway Company and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

S. H. Steele, for appellant.

L. C. Gilman, for respondents.

RUDKIN, J. Railroad avenue, between Yesler Way and Washington street, in the city of Seattle, is one of the public thoroughfares of said city, but is largely used for railroad purposes. The Northern Pacific Railway Company and the Great Northern Railway Company own, operate, and control several tracks along said avenue between the above points. The tracks owned by each company are under its exclusive dominion and control, and are only used by the other company in the manner and for the purpose hereinafter stated. Whenever it becomes necessary to transfer freight cars from the tracks of one company to the tracks of the other, such transfer is made by means of a switch which connects the tracks of the two companies. Such transfer is sometimes made by the employees of one company, and sometimes by the employees of the other. Except for the purpose of effecting such transfer, neither company uses, or has any control over, the tracks of the other. On the 7th day of August, 1903, the plaintiff was driving his horse and wagon diagonally across said Railroad avenue, and as he crossed one of the tracks of the Northern Pacific Railway Company the wheel of his wagon dropped into a hole in said track, from 2 to 8 inches wide, 12 inches long, and 10 inches deep, resulting from a failure to block and securely guard the rail on said track, and became fast. While the plaintiff was endeavoring to release his wagon, a locomotive owned by the defendant Great Northern Railway Company, operated by the defendant Monohan, and engaged in transfer-

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ring freight cars as above set forth, ran into the plaintiff, destroyed his wagon and harness, and injured the plaintiff himself. This action was brought to recover damages for the injury to the plaintiff and his property. Two grounds of negligence are alleged in the complaint: First, the unsafe and defective condition of the track where the injury occurred; and, second, negligence in the operation of the locomotive that caused the injury. The cause was tried before a jury, resulting in a general verdict for the defendants, accompanied by the following special finding: "Q. Did the defendant the Great Northern Railway Company own or control, or was it under any contract or agreement to construct, maintain, or repair, the track on which the accident which is the subject of this action occurred? A. No." Judgment was entered on the verdict in favor of the defendants, and the plaintiff appeals.

The verdict of the jury eliminates the second ground of negligence charged, viz., negligence in the operation of the locomotive which caused the injury, and no error is assigned on that branch of the case.

At the request of respondents, the court instructed the jury as follows: "One of the grounds of negligence alleged in the complaint is that the track on which the accident occurred was so constructed as to be in a dangerous condition, and not admit of the ready and free passage of vehicles across the same. Upon this question I charge you that if you shall find from the evidence in this case that the track in question was not the property of the defendant company, and that it had no control over the same, and was under no agreement to construct, maintain, or repair it, and was allowed to use it only as a mere matter of convenience for the transfer of cars from tracks of its own system to those of another system, then the defendant company would be under no duty or obligation to the public to see that said tracks were properly constructed or kept in proper repair or properly maintained. The defendant company would be under no obligation to the public, or otherwise, to repair tracks belonging to another company and of which it had no control, and concerning which it had made no agreement in reference to construction, maintenance, or repair, and, if you shall find from the evidence in this case that the track in question was not owned by or in some way controlled by defendant company, and that it was under no agreement to construct, maintain, or repair it, and that the defendants properly and with due care operated the train which came in collision with the plaintiff's vehicle, then your verdict must be for the defendants." The principle question discussed on this appeal arises out of the giving of the above instruction and the refusal of the court to give other instructions, the substance of which is contained in the following: "If you find from the evidence that at the time of the injury the defendant Great Northern Railway Company was operating its trains on the tracks where the plaintiff was injured, on Railroad avenue, then and in

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that case it would be the duty of the defendant Great Northern Railway Company to use reasonable effort to keep said track in repair and in reasonably safe condition for public travel thereon." In cases such as this the liability of a railway company depends upon its control over the agency causing the injury, or the duty it owes to the injured party. It owes one duty to a passenger, another to an employee, and still another to a stranger. Counsel for appellant cites and relies on the case of *Herrman v. Great Northern Ry. Co.*, 27 Wash. 472, 68 Pac. 82, 57 L. R. A. 390. In that case the plaintiff was injured on a sidewalk on the line of the defendant's road in front of the depot where its trains arrived and departed, and where tickets were sold to intending passengers. The plaintiff went to this depot on business with the company, and with a view of becoming a passenger on one of its trains. Under these facts this court held that it was the duty of the defendant company to keep the premises to which it invited its passengers to come to purchase tickets and take passage on its trains, as well as the approaches thereto, in a safe condition, and that it could not escape liability for an injury to one of its passengers, or to one occupying a similar position, by showing that the depot and the approaches thereto where the injury occurred were owned and controlled by an independent corporation. We fail to see the application of the case cited to the case at bar. A railway company owes certain positive duties to its passengers which it cannot neglect or intrust to others. But the duty it owes to its passengers and the duty it owes to strangers are entirely different. To a passenger it owes the duty to maintain a safe means of ingress and egress to and from its trains, whether it owns or controls the means or not. To a stranger it owes the same duty as any other property owner. Had the plaintiff in the case cited been a mere stranger to the defendant company, he could not have recovered. In other words, the railway company in that case neglected a duty it owed to one of its passengers, but neglected no duty it owed to a stranger, unless it had dominion and control over the agency causing the injury. The rule that the duty to keep premises in a safe condition devolves upon the party in possession and having control and dominion over them is a very general one, and is founded in reason. To hold a party liable in damages for the condition of property over which he has no control, and which he cannot repair without committing a trespass, is both unreasonable and unjust. As said by the Court of Appeals of New York, in *Reynolds v. Van Beuren*, 155 N. Y. 120, 49 N. E. 763, 42 L. R. A. 129: "The foundation of the duty is the possession and right to manage and control the property. It would be manifestly unjust to impose such a duty upon parties who have no possession and no dominion over it."

The question of the liability of lessors and lessees of railways is not involved in this case, as that relation manifestly did not exist between the Northern Pacific Railway Company and the

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Great Northern Railway Company under the facts appearing in this record. We might say in passing, however, that, while the law imposes liabilities on the lessors of railroad property which it does not as a general rule impose on the lessors of other property, yet the liability of the lessee of railroad property seems to be substantially the same and to rest on the same foundation as does the liability of the lessee of any other class of property. The case of *Trask v. Old Colony Railroad*, 156 Mass. 298, 31 N. E. 6, arose under a statute, but the language of the court is pertinent here: "The occasional use by each company of the tracks of the other, in delivering and taking cars in the course of business, would not, to that extent, make the track of each a part of the ways, works, or machinery of the other. It was permitted for their mutual accommodation, and was merely a license which did not give either any rights in or control over, and which did not impose upon either any obligation respecting the track of the other. The character of the business transacted is to be considered, and it would be unreasonable to hold that each company was bound to leave and take cars at the precise point of connection at peril, if it did not do so, of making the track of the other part of its ways, works, and machinery, and of becoming liable for injuries resulting from any defect in it." That the duty to keep premises in a safe condition of repair rests upon the party in possession, having control and dominion over them, and not upon parties who have neither control nor dominion nor the right to repair, see the following cases: *Gwathney v. Railway Co.*, 12 Ohio St. 92; *Engle v. Railway Company*, 160 Mass. 260, 35 N. E. 547, 22 L. R. A. 283; *Coffee v. Railway Company*, 155 Mass. 21, 28 N. E. 1128; *Regan v. Donovan*, 159 Mass. 1, 33 N. E. 702; *Liddle v. Railway Company*, 23 Iowa, 378; *Parker v. Railway Company*, 16 Barb. 315; *Byrne v. Railway Company*, 61 Fed. 605, 9 C. C. A. 666, 24 L. R. A. 693; *Miller v. Railway Company*, 76 Iowa, 655, 39 N. W. 188, 14 Am. St. Rep. 258; *Harper v. Railway*, 90 Ky. 359, 14 S. W. 346; *Atwood v. Railroad Company (C. C.)* 72 Fed. 447; *Railway Company v. Gaughan (Ind. App.)* 58 N. E. 1072; *Derrenbacher v. Railway Company*, 87 N. Y. 636; *Railway Company v. Culberson*, 68 Tex. 664, 5 S. W. 820; *Miller v. Railway Company*, 125 N. Y. 118, 26 N. E. 35; *Evans v. Railroad Company (Tex. App.)* 18 S. W. 493.

Appellant also cites us to the act of March 6, 1899 (Laws 1899, p. 49, c. 35). The first section of said act requires every person or company owning or operating a railroad to block and securely guard frogs, switches, and guard rails, so as to protect and prevent the feet of employees and other persons from being caught therein, the second section gives a right of action to parties injured from a failure to comply with the provisions of the act, and the third section imposes a penalty for its violation. The statement of this case, as contained in this opinion, is taken largely from the pleadings and briefs. The bill of excep-

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tions does not contain all the testimony. In fact, it contains none of the testimony showing the nature or character of the defect which is alleged to have caused or contributed to the injury. The application of this statute to the case before us is therefore not shown, and we must decline to consider it.

Nor is there any foundation for the contention that the pleadings admit that the respondent company operated trains on the track where the injury occurred. The third paragraph of the complaint alleged in general terms that the respondents were operating trains on Railroad avenue, near the east side thereof, and other facts not material here. The answer denied each and every allegation contained in said paragraph, except that the respondents were operating trains on Railroad avenue. We fail to discover any admission here.

Finding no error in the record, the judgment of the court below is affirmed.

MOUNT, C. J., and CROW, DUNBAR, FULLERTON, HADLEY, and ROOT, JJ., concur.

MOORE v. SOUTHERN RY. CO.

(Supreme Court of North Carolina, April 10, 1906.)

[53 S. E. 745.]

Master and Servant—Injuries to Servant—Defective Machinery.*—Where, in consequence of the defective and worn condition of an engine and its gearing and fixtures, carelessly and negligently provided by a railroad company, a wrought-iron cup was snapped from the driving rod while the engine was running at a high speed, and the cup was thrown by the driving rod and struck the right eye of the engineer, permanently destroying its sight, and impairing his nervous system, and doing him other permanent injuries, the railroad company was liable therefor.

Appeal from Superior Court, Durham County; Ferguson, Judge.

Action by John M. Moore against the Southern Railway Company. From a judgment overruling a demurrer to the complaint, defendant appeals. Affirmed.

Guthrie & Guthrie, for appellant.

Winston & Bryant, for appellee.

BROWN, J. We have been favored with an argument and an elaborate brief, in this case, by the learned counsel for the defendant, largely devoted to an attack upon the constitutionality

*For the authorities in this series on the subject of the care required of a master in furnishing appliances, see foot-notes appended to *Meehan v. Great Northern Ry. Co.* (N. Dak.), 18 R. R. R. 34, 41 Am. & Eng. R. Cas., N. S., 34; foot-notes appended to *Smith v. Fordyce* (Mo.), 16 R. R. R. 378, 39 Am. & Eng. R. Cas., N. S., 378.

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of the fellow servant act of 1897 (Revisal 1905, § 2646), in which we are asked to overrule Hancock's Case, 124 N. C. 222, 32 S. E. 679, and other cases sustaining the validity of such act. Were we disposed to consider the matter, we could not do so upon this record, for nowhere, so far as we can see, is such a question presented. The demurrer, of course, admits the truth of the facts alleged in the complaint, and, taking those facts to be true, we are of opinion that the complaint states a cause of action which the defendant is required to answer.

The allegations of the complaint aver that plaintiff was an engineer in the service of defendant; that the defendant negligently failed to supply a reasonably safe and properly equipped engine, in consequence of which plaintiff was injured. The complaint more specifically alleges that plaintiff was running his engine under orders at a high rate of speed "when suddenly, in consequence of the defective and worn condition of said engine and gearing and fixtures, carelessly and negligently provided and furnished by defendant, as hereinbefore stated, the said wrought iron cup above referred to (being on the said worn and defective side rod), about 3 inches in diameter and weighing about two pounds, was snapped from the driving rod, by reason of the disalignment of said gearing and the loss of motion caused by said defects in said engine, which driving rod was moving at a great rate of speed, horizontally—the said cup having been placed on the driving rod in order to hold oil to lubricate the pin which held the side rod—and was thrown by said driving rod with force and violence from its position and struck the right eye of the plaintiff, permanently destroying the sight of the same and impairing his nervous system and doing him other permanent injuries hereinafter set out." These facts, together with the others set out in the complaint, if established by proof, make out a cause of action. It is universally held at this day that it is the master's duty to furnish his servant reasonably safe machinery. If he fails to do so he exposes the servant to extraordinary risks and hazards. *Hicks v. Mfg. Co.*, 138 N. C. 320, 50 S. E. 703; *Pressly v. Yarn Mills*, 138 N. C. 413, 51 S. E. 69; *Labatt*, § 279 (a) 296, 297, 298 (a). The failure to exercise due care in furnishing such machinery is a breach of duty which the master owes the servant. *Tanner v. Hitch* (at this term) 53 S. E. 287.

We will not discuss the question of contributory negligence attempted to be presented by the demurrer. That is a defense which will be more properly considered when the facts are found by the jury. Certainly there are no facts stated in the complaint which the court can, as a matter of law, declare constitutes contributory negligence.

Affirmed.

GULF, C. & S. F. Ry. Co. *v.* HUYETT.

(Supreme Court of Texas, April 18, 1906.)

[92 S. W. Rep. 454.]

Release—Misrepresentations of Agent—Unauthorized Declaration.—An employee may not have his settlement with his employer for personal injuries set aside for misrepresentations as to his condition by a physician in the master's employ, the physician having no authority in relation to the settlement or to make representations, the representations not having been made in the transaction in which the settlement was made, and the master or the agent who made the settlement having no knowledge of the representations.

Principal and Agent—Evidence of Agency—Sufficiency.—Evidence that a physician in the employ of plaintiff's master made a misrepresentation to plaintiff, who had been injured in the course of his employment, as to his condition, and that on an occasion not shown to have had any connection with the settlement made by plaintiff, the physician when asked by plaintiff as to the propriety of his making a settlement, replied that a reasonable settlement would be better than a prolonged law suit, does not warrant a finding that the physician was employed to make the representation, or that the master or the agent who made the settlement knew of the representation, as against uncontradicted testimony to the contrary.

Master and Servant—Assumption of Risk.*—An employee assumes the risk of danger brought about by the negligence of the master, where to the knowledge of the employee the work is commonly done in the negligent manner which caused the accident.

Error from Court of Civil Appeals of Second Supreme Judicial District.

Action by Bert Huyett against the Gulf, Colorado & Santa Fe Railway Company. Judgment for plaintiff 89 S. W. 1118. Defendant brings error. Reversed.

A. H. Culwell and *J. W. Terry*, for plaintiff in error.
Stuart & Bell, for defendant in error.

WILLIAMS, J. The defendant in error, who had received personal injuries while in the service of plaintiff in error, in consideration of the payment by the latter of the sum of \$250 executed to it a release of all damages thus sustained. He subsequently brought this suit to recover such damages wherein he sought to avoid the release on the ground that it was obtained by a misrepresentation made to him by one of the surgeons of the railroad company engaged in treating him in its hospital as to the nature and extent of his injuries and as to his recovery therefrom. His version of the transaction is that on Friday, October 16, 1903, he had an interview with defendant's claim agent concerning a settlement in which he proposed to settle

*For the authorities in this series on the subject of the general principles involved in the doctrine of assumption of risks by employees, see foot-notes appended to *Houston & T. C. R. Co. v. Turner* (Tex.), 18 R. R. R. 630, 41 Am. & Eng. R. Cas., N. S., 630.

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for \$2,000, and the claim agent declined to consider his proposition; that on the next day, Dr. Scott, one of the surgeons in charge of the hospital, when visiting it, requested him to "stand in front of him," and, when he did so, said to him, "Huyett, you are not damaged, you will soon be as good a man as ever; you will soon be able to go to work"; that, believing this statement to be true, and being induced by it, on the following Monday he renewed his negotiation with the claim agent and settled with him for \$250. It is conceded by Dr. Scott, and shown by all the evidence, that the statement thus attributed to him, if made, was untrue, and did not fairly represent plaintiff's condition; but Dr. Scott explicitly denies having made it. There is no evidence that the doctor knew of the interviews between plaintiff and the claim agent, or that a settlement was then being discussed between them, nor is there any evidence that the claim agent knew of the statement made by the doctor to the plaintiff, or that the doctor in any way acted with him in procuring or for the purpose of procuring a settlement. It may be conceded that the evidence sufficiently shows that Dr. Scott was an agent of the defendant in rendering services as physician and surgeon to its injured employees at the hospital, and that it lay within the scope of his employment not only to treat them but to advise them concerning the nature and duration of their injuries, and the probability of their recovery. It appears, also, to have been a part of his duty to give information on these subjects to the defendant's employees in its claim department. But, beyond this, he had no connection with that department and nothing to do with making settlements and obtaining releases or in conducting negotiations therefor. The representation relied on to avoid the release, therefore, does not appear to have been made in the transaction in which the contract of settlement was made nor by the agent authorized to represent the defendant therein; but, so far as the evidence indicates, it was disconnected from that contract and made by an agent whose duties, as agent, had no relation to such matters. The law upon the subject is thus laid down by Judge Story in his work on Agency, § 135, whose statement is supported by many decisions: "* * * If the agent, at the time of the contract, makes any representation, declaration, or admission, touching the matter of the contract, it is treated as the representation, declaration, or admission of the principal himself. But the qualifications above stated are also most important to be attended to. The representation, declaration, or admission of the agent, does not bind the principal, if it is not made at the very time of the contract, but upon another occasion; or if it does not concern the subject-matter of the contract, but some other matter, in no degree belonging to the *res gestæ*." In section 137, the principle is thus illustrated: "Thus, for example, what an agent has said, or represented, at the time of the sale of a horse; which sale was authorized by his master, whether it be a representation or a warranty of

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soundness, or of any other quality, will be binding upon the master. But, what he has said upon the subject at another time, or upon another occasion, will not be binding upon him; for it is no part of the *res gestæ*; and did not attach, as an incident or inducement to the sale. For such purposes the agent is no longer acting as agent of the master; and his declarations are not to be used as proofs against the master; but the facts contained in those declarations must be proved aliunde. Indeed, in such cases, the agent himself may be properly called as a witness, and, hence, it has been said that his declarations are not the best evidence of the facts."

According to this, if the representation relied on had been made by the agent who effected the settlement, but in a different transaction, it could not affect the rights of the principal under the contract. For a stronger reason is this true of a representation made, not only in a different transaction, but by another agent having no authority in relation to or connection with the settlement. His statements have only the relation to the contract of settlement that those of a stranger would have, for the reason that in making them he did not represent the defendant with respect to the settlement. *Thompson on Corporations*, § 6324; *Bank v. Cruger*, 91 Tex. 451, 452, 44 S. W. 278. The mere fact, therefore, that he was an agent of the defendant for some purposes does not make his representation available as a reason for avoiding a contract which he did not make. It is true that if he, assuming to act for defendant, had procured the release, whether authorized to do so or not, and the defendant were seeking to avail itself of it as a defense, any fraud practiced by him in obtaining it would be imputed to defendant. But a contract complete in all respects was made by defendant through its other agent, and hence the principle laid down in *Henderson v. Railroad Company*, 17 Tex. 560, 67 Am. Dec. 675, is not applicable, for the reason that the representation of an agent not shown to have had connection with that contract cannot be used to defeat it. It is also true that, if it were shown that defendant or its claim agent used the physician as an instrument to deceive plaintiff as to his condition in order that an advantageous settlement might be made, or that the claim agent and the physician acted together in so procuring the release, the contract would be affected by the physician's representations as fully as if he had been the only agent employed in the transaction (*I. & G. N. Ry. Co. v. Shuford* [Tex. Civ. App.] 81 S. W. 1189); and it may be that, if the claim agent in effecting the settlement knew and took advantage of the state of plaintiff's mind, caused by deception practiced by the doctor, the result would be the same. But such things as this must be proved and cannot be supplied by conjecture or suspicion. If plaintiff's statement be accepted that Dr. Scott made the statement, which all concede would have been a glaring misrepresentation of the char-

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acter of plaintiff's injuries and of his condition, the question as to why he did so would naturally arise in one's mind and might suggest suspicion as to his purposes; but this is not sufficient to warrant the finding of the facts, of which there is no other evidence, that he was employed by defendant or its other agent to make the representation or that they knew that he had done so. Some matters in the record are relied on by the defendant in error to establish these facts such as that Dr. Scott, on some occasion not shown to have had any connection with the settlement made, when asked by plaintiff as to the propriety of his making a settlement, replied in effect that a reasonable settlement would be better than a prolonged lawsuit and the fact that the representation and the settlement were so closely connected in time and sequence; but while these circumstances are consistent with the conclusion that plaintiff seeks to establish, they are certainly not inconsistent with the opposite one supported by the uncontradicted testimony of both agents that there was no knowledge on the part of either of what the other did. In the case of *Houston & Texas Central Railway Company v. Brown* (Tex. Civ. App.) 69 S. W. 651, in which a writ of error was refused, no question was made in this court, nor, as we judge from its opinion, in the Court of Civil Appeals, as to the responsibility of the railway company for the representations of the physician which were held sufficient to avoid the release there in question.

As the cause is to be remanded because of the insufficiency of the evidence as pointed out, and of error in the charge of the court under which the jury were authorized without sufficient evidence to impute to the defendant the representation of Dr. Scott, we deem it proper to notice one other assignment of error. The trial court charged the jury, upon plaintiff's original cause of action, that a servant does not assume the risk of dangers brought about by the negligence of the master. There was evidence in the case which called for the statement of the well-known qualification of this rule applicable where the servant has knowledge when he enters upon the work in which he is hurt of the negligence of his employer and of the danger created thereby to which he (the servant) is to be exposed in doing such work. The plaintiff claimed that he was hurt by the negligence of his superior in ordering the raising of the hammer of a pile-driver, when the pile to be driven was also suspended in the air, in such manner that the hammer caused the pile to swing against plaintiff and knock him from the bridge on which he was standing to assist in the work. The wrong is alleged to have consisted in raising the hammer before the pile had been lowered to the ground. The plaintiff's evidence represented this as an unusual occurrence, such as he had never witnessed before, and, of course, upon his statement there could be no assumption of the risk. But the defendant's evidence tended to show that this was not

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only the common but the proper way of doing the work. If the jury agreed with its contention in toto, they necessarily concluded that there was no negligence and hence the instruction could have done no harm. But the jury could, perhaps, have thought that, while this was a dangerous and negligent manner of doing the work, yet it was the one in which it was commonly and habitually done by defendant and that plaintiff knew that fact. Under such circumstances there would, we think, be an assumption of risk arising from a danger known to have sprung from the master's negligence. Of course the mere fact that such an occurrence may have occasionally happened before would not have this effect, for the reason that an employee may not be held to foreknow that negligent conduct will be repeated. The assumption of risk would arise from the doing of the work in a manner so common and habitual that the employee should know that it will be followed on the particular occasion. Whether or not the charge referred to would be cause to reverse the judgment when no further instruction was requested it is unnecessary to determine. For the errors first pointed out the judgment is reversed, and the cause remanded.

Reversed and remanded.

UNITED RAILWAYS & ELECTRIC CO. OF BALTIMORE v. WATKINS

(Court of Appeals of Maryland, Nov. 23, 1905.)

[62 Atl. Rep. 234.]

Street Railroads—Right of Company and Individuals to Use Street.*—The rights of a street railway company and of an individual to the use of the streets are equal, and each owes to the other the same duty to avoid injury.

Same—Injury to Traveler—Contributory Negligence.†—While a street railway company and an individual have an equal right to

*See foot-notes appended to *Marden v. Portsmouth, etc., St. Ry. (Me.)*, 17 R. R. R. 821, 40 Am. & Eng. R. Cas., N. S., 821; *South Side Elevated R. Co. v. Nesvic (Ill.)*, 17 R. R. R. 805, 40 Am. & Eng. R. Cas., N. S., 805; *Dungan v. Wilmington City Ry. Co. (Del.)*, 14 R. R. R. 746, 37 Am. & Eng. R. Cas., N. S., 746; *Birmingham Ry. Light & Power Co. v. Oldham (Ala.)*, 14 R. R. R. 165, 37 Am. & Eng. R. Cas., N. S., 165; *Rhymes v. Jackson Elec. Ry., etc., Co. (Miss.)*, 14 R. R. R. 7, 37 Am. & Eng. R. Cas., N. S., 7; *Lightfoot v. Winnebago Traction Co. (Wis.)*, 14 R. R. R. 1, 37 Am. & Eng. R. Cas., N. S., 1.

†As to the care required of those driving other vehicles on streets upon which street cars are operated, see foot-note appended to *McCarthy v. Boston Elevated Ry. Co. (Mass.)*, 17 R. R. R. 856, 40 Am. & Eng. R. Cas., N. S., 856; foot-notes appended to *Marden v. Portsmouth, etc., St. Ry. (Me.)*, 17 R. R. R. 821, 40 Am. & Eng. R. Cas., N. S., 821; foot-note appended to *Riley v. Shreveport Traction Co. (La.)*, 16 R. R. R. 785, 39 Am. & Eng. R. Cas., N. S., 785; *Wood v. Boston Elevated Ry. Co. (Mass.)*, 16 R. R. R. 475, 39 Am. & Eng. R. Cas., N. S., 475.

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the use of a highway, an individual who, in disregard of his own safety, undertakes to cross the company's track when no prudent person would do so, cannot recover for the injuries sustained in a collision with a car.

Same.†—It is not negligence as a matter of law for a traveler driving a four-horse wagon to attempt to cross a street car track when a car approaching is a block distant, but the question is for the jury.

Same—Negligence of Company—Question for Jury.—Whether a street railway company was guilty of actionable negligence, and liable for injuries received in a collision by a traveler when attempting to cross the tracks, held, under the evidence, for the jury.

Negligence—Submission of Issue to Jury—Necessity.—Where the nature of an act relied on to show negligence contributing to a personal injury can only be determined by considering all the circumstances, it is the province of the jury to pass on and characterize it.

Appeal from Court of Common Pleas; George M. Sharp, Judge.

Action by Stephen Watkins against the United Railways & Electric Company of Baltimore. From a judgment for plaintiff, defendant appeals. Affirmed.

Argued before MCSHERRY, C. J., and BRISCOE, BOYD, PAGE, PEARCE, SCHMUCKER, JONES, and BURKE, JJ.

Fielder C. Slingluff, for appellant.

Robert F. Leach, Jr., for appellee.

MCSHERRY, C. J. This is another personal injury case, and the only questions which we are required to consider arise on the prayers for instructions to the jury. The facts are few, and there is no conflict in the testimony. It appears that the appellee, who is a farmer residing in Howard county, was driving a four-horse wagon, loaded with furniture, along Carey street, in Baltimore City. Carey street intersects Baltimore street at right angles. Calhoun street, which also crosses Baltimore street in the same way, is west of, and one block distant from, Carey street. The double tracks of the United Railways & Electric Company of Baltimore are located on Baltimore street. The north track is used by street cars going west on Baltimore street, and the south track is used by the cars going east on that street. The appellee was driving in a southerly direction; that is, towards Baltimore street. His course took him across the double tracks on Baltimore street at the intersection of that street with Carey street, as he intended to continue on down the last-named street towards his destination after crossing Baltimore street. When he emerged from Carey street into Baltimore street, he saw a car of the appellant company a square distant, up at Calhoun street. The car was on the south track, going east, and therefore going towards the appellee. He concluded that he would have ample time to cross the tracks before the car could traverse the distance separating it, and his team and he therefore drove onward

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without waiting for the car to pass. Midway between, and parallel to, Calhoun and Carey streets there is an alley opening into Baltimore street. When the car reached the alley, several of the witnesses have testified that it materially increased its speed. At that juncture the lead horses were just up to or perhaps just upon the north track, not the track on which the car was approaching, and the appellee pressed forward, and the car struck between the lead horses and the wheel horses, pushing the wagon around at right angles to the direction it was proceeding, and knocking down and injuring three of the horses and seriously wounding the appellee. The distances from Calhoun street to Carey street, and from Calhoun street to the alley, are not given in the record. There was testimony adduced tending to show that the motorman upon reaching the alley turned on the electric current, instead of applying the brakes, though descending a slight downgrade, whereby a collision became, not only imminent, but inevitable, and that the car then commenced to run and continued onward at a unusually high rate of speed until it struck the team. On this state of facts the appellant asked the court to withdraw the case from the consideration of the jury, on the ground, first, that there was no evidence in the case legally sufficient to entitle the plaintiff to recover; and, secondly, because, according to the uncontradicted evidence in the case, the plaintiff was guilty of negligence directly contributing to the accident complained of.

As we have often said, and now repeat, negligence, both primary and contributory, is essentially relative, and comparative, and not absolute. Whether it exists or does not exist in either form in a given case must, necessarily depend upon the circumstances of that case. In every instance it must in the last analysis be some breach of the duty owed by one person to another, and, as the duty, whose breach is relied on as actionable negligence, varies under different conditions, the conditions must be known before negligence can be predicated of any act producing an injury. There is no analogy between a case like this and a case which grows out of an injury inflicted at a crossing over a railroad in the open country, because the rights and the reciprocal duties of both the injured and the injuring parties are radiacally different in the one instance from their rights and their reciprocal duties in the other instance. A street railway company has no exclusive right to the use of a public highway in a city for the movement of its cars, and possesses no greater or superior right to use the street than is enjoyed by any individual, apart from the mere franchise to lay its rails thereon. That franchise in no way exempts such a company from an imperative obligation to exercise due and proper care in propelling its cars to avoid injuring persons who have an equal right to use the same street as a thoroughfare. Inasmuch as the right of the individual to use the street

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is coextensive with the like right of the railway, each, as a consequence, owes to the other precisely the same duty to avoid an injury, and the railway company has no more right carelessly to run its cars along its tracks than the individual has carelessly to cross or traverse them. Looking to and bearing in mind these mutual and reciprocal rights and duties, the case comes to the question whether there was a breach of duty on the part of the company in carelessly disregarding the right of the appellee to cross the tracks at the intersection of Baltimore and Carey streets, or whether the appellee was careless—that is, negligent—in attempting to make that crossing when he knew, or ought to have known by the simple process of using his eyes, that it would not be possible for him to get over the tracks before the car would collide with the wagon.

When the facts show, as in some of the cases they have shown, that the injury had resulted from a deliberate, but unsuccessful, effort to cross the track in the face of evident danger, or when the disaster had been due to a miscalculation as to the chances of the individual being able to clear the track before the car would reach the point where the collision coincidentally occurred, a recovery has been denied upon the obvious ground that such a reckless attempt was gross negligence on the part of the person injured. Whilst each party, the driver of the team and the railway company, had an equal right to use the highway lawfully, neither was justified in using it in such a way as to imperil the safety of the other, and the individual who disregarded his own safety by rashly undertaking to cross the track when no prudent man would venture to do so was in no position to hold the company answerable for the consequences of his own heedlessness or folly. In the very nature of things, no hard and fast rule can be laid down by which every case of this character can be measured, and therefore the ultimate conclusion reached in one controversy cannot necessarily control the final decision of some other similar, though not precisely identical, contest. This fact renders it unnecessary to analyze or to refer to the numerous cases cited in the argument. They, and many others, have grown out of their own peculiar circumstances, and the differences in those circumstances, sometimes very slight, it is true, distinguish and differentiate the cases from each other and from this one.

If it be true, and it was for the jury to say whether it was, that, when the appellee started to cross Baltimore street the car was at Calhoun street, an entire block distant, then it cannot be said as a matter of law that there was negligence on the part of the appellee in attempting to cross over the tracks before the car had passed Carey street, unless it be assumed as a fixed and unvarying postulate that no one who may be driving a four-horse wagon in the city can prudently cross the tracks at intersecting streets whilst a street car coming towards him is as near as the distance of a block from the point of crossing. No

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such postulate has ever been announced or could be accepted, if asserted. The mere fact, then, of attempting to cross over the street car tracks in a city when an approaching car is no nearer than just indicated cannot be considered an act of negligence, and it was clearly for the jury to say whether, if the speed of the car had not been materially and perceptibly increased after the midway alley had been passed by it, there would have been abundant time for the team and wagon to clear the tracks before the car reached the point where the collision occurred. It is not disputed that the speed of the car was greatly accelerated as it approached the team, or that the nearer it got the faster it ran. If the speed had not been thus increased, it is probable no accident would have happened; and, if this be so, it was obviously not for the court to rule as a matter of law that the appellee was guilty of negligence in not anticipating the possible contingency of a collision resulting from an unusually rapid motion of the car. It does not appear from the record that there was the slightest danger of an accident when the appellee started to cross Baltimore street; and, if the situation changed thereafter, it was for the jury to determine what caused the change and who was responsible for it, since there is no such distinct, prominent, and decisive fact proved, about which ordinary minds would not differ, as to justify the court in pronouncing the appellee's conduct in driving forward such contributing negligence in law as would preclude him from recovering. When the nature and attributes of the act relied on to show negligence contributing to the injury can only be correctly determined by considering all the attending and surrounding circumstances of the transaction, it falls within the province of the jury to pass upon and characterize it, and it is not for the court to determine its quality as a matter of law. *Cooke v. Balto. Traction Co.*, 80 Md. 558, 31 Atl. 327.

It follows from what we have said, first, that there was, in our opinion, some evidence of negligence on the part of the appellant company, indicated by the unusual speed of the car and by the turning on of the power and the failure to apply the brakes, which evidence the court could not properly withdraw from the consideration of the jury; secondly, that upon the question of contributory negligence the jury was the proper tribunal to pass, in view of the circumstances proved in the case. No special reference need be made to the instructions granted at the instance of the appellee, because similar ones have been so often upheld by this court in other cases that they must be regarded as accurately stating the law.

Finding no error in the rulings excepted to, the judgment, which was in favor of the appellee must be affirmed.

Judgment affirmed, with costs above and below.

WALKER'S ADM'R v. POTOMAC, F. & P. R. Co.

(Supreme Court of Appeals of Virginia, March 22, 1906.)

[53 S. E. Rep. 113:]

Negligence—Injuries to Children—Turntables.*—Under the common-law rule that a landowner owes no duty to a trespasser or bare licensee to have his land in a safe condition, a railroad company is guilty of no negligence in maintaining an unlocked and unfastened turntable on its premises, at a distance of 50 to 300 feet from public grounds, resulting in an accident causing the death of a child 12 years old, who trespassed thereon.

Error to Circuit Court, Orange County.

Action by the administrator of Bernard Lee Walker against the Potomac, Fredericksburg & Piedmont Railroad Company. From a judgment in favor of defendant, plaintiff brings error. Affirmed.

Morton & Shackelford and *Meredith & Cocke*, for plaintiff in error.

St. Geo. R. Fitzhugh and *J. G. Williams*, for defendant in error.

BUCHANAN, J. This action was instituted by the plaintiff in error against the defendant company to recover damages for the death of his intestate, caused by the alleged negligence of the defendant.

The evidence shows that the defendant has a turntable on its own premises near Orange Courthouse, located about 220 feet from its station or depot; about 360 feet from the public road, which runs from the depot to the village of Orange Courthouse; close by a millroad, which is not public; 50 or 60 feet from what is known as the "Horse Show grounds"; and about 340 feet from any inhabited house; and in an open and unoccupied field; that boys were in the habit of playing ball on the Horse Show grounds, between which and the railway land there was no fence; that boys frequently rode on the turntable, and had once been seen riding on it by the depot agent; that some years before the accident two boys had been injured in playing with the turntable, which was of the ordinary kind in use, and was neither locked nor fastened; that on the Sunday evening of the accident, the plaintiff's intestate, who was a little over 12 years of age, with two other boys of about the same age, was pushing the turntable around the track preparing to jump on it and as he did so one of his feet was caught between the rails and mashed, causing lockjaw, from the effects of which he died.

*See foot-notes appended to *Berg v. Minneapolis & St. L. R. Co.* (Minn.), 17 R. R. R. 816, 40 Am. & Eng. R. Cas., N. S., 616; *Dalin v. Worcester Con. St. Ry. Co.* (Mass.), 16 R. R. R. 476, 39 Am. & Eng. R. Cas., N. S., 476.

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Upon the trial of the cause, there was a verdict and judgment in favor of the defendant. To that judgment this writ of error was awarded.

The only question involved in this writ of error is whether or not under the facts of the case, which are not disputed, the defendant was guilty of negligence in leaving the turntable in the place where it was, on its own premises, unfenced and unfastened.

The general rule is that a landowner does not owe to a trespasser (and the same is true of a bare licensee) the duty of having his land in a safe condition for a trespasser to enter upon. The latter has ordinarily no remedy for harm happening to him from the nature of the property upon which he intrudes, and he takes upon himself the risks of the condition of the land, and to recover for an injury happening to him he must show that it was wantonly inflicted, or that the owner or occupant being present could have prevented the injury by the exercise of ordinary care after discovering the danger. *Norfolk & Western Ry. Co. v. Wood*, '99 Va. 156, 158, 159, 37 S. E. 846; *Hortenstein v. Va.-Carolina Ry. Co.*, 102 Va. 914, 918, 47 S. E. 996; *Williamson v. Southern Ry. Co.*, 104 Va. —, 51 S. E. 195; *Bishop on Non-contract Law*, § 845; *Cooley on Torts* (2d Ed.) 791-794.

It is not denied, as we understand the counsel for the plaintiff, that such is the common-law doctrine as to adult trespassers and bare licensees; but his contention is that under certain circumstances, such as are disclosed by this record, it is not the rule as applied to children. To sustain that contention, he relies upon the case of *Sioux City R. Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745, and the cases which follow it.

While these cases, which are known as "The Turntable Cases," fully sustain the plaintiff's contention, there is a remarkable conflict of authority upon the subject. The doctrine announced in the Stout Case has been discussed in numerous cases, by the appellate courts of many of the states of this country, with the result that there are many authorities sustaining the doctrine in its broadest sense; while many utterly repudiate it, and others give it a qualified recognition, and practically limit it to railroad turntable cases. A question or problem, which has given rise to such a wide divergence of opinion, is not of easy solution.

As this is the first case involving this precise question which has ever come to this court, so far as the reported decisions show, we are at liberty to follow that line of decisions which, in our judgment, is more nearly in accord with settled principles of law, and is sustained by the better reason.

In order for the plaintiff to recover in this case, it must appear that the defendant company owed his intestate some duty which it failed to discharge; for where there is no duty there can be no negligence. *N. & W. Ry. Co. v. Wood*, 99 Va. 156, 158, 159, 37 S. E. 864; *Hortenstein v. Va.-Car. Ry. Co.*, 102 Va. 914, 918, 47 S. E. 996; *Carson Lime Co. v. Rutherford*, 102 Va. 252, 46 S. E. 304.

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As before stated, the common law imposes no duty upon a landowner to use care to keep his premises in such condition that trespassers and bare licensees going thereon may not be injured. This is unquestionably the rule as to adults, and the weight of authority, as it seems to us, shows that it is the rule as to children.

The cases cited in the case of *Sioux City R. Co. v. Stout*, to sustain the opposite view, do not, as it seems to us, do so. Those cases come within other rules, or within well-defined exceptions to the general rule that a landowner owes no duty to a trespasser, adult or infant, except that he must not wantonly or intentionally injure him or expose him to danger. This is clearly shown, we think, by the Supreme Judicial Court of Massachusetts, in the case of *Daniels v. N. Y. & N. E. R. Co.*, 154 Mass. 349, 28 N. E. 283, 13 L. R. A. 248, 249, 26 Am. St. Rep. 253, and by Judge Peckham (now of the Supreme Court of the United States), in delivering the opinion of the Court of Appeals of New York, in *Walsh v. Fitchburg R. Co.*, 145 N. Y. 301, 39 N. E. 1068, 27 L. R. A. 724, 45 Am. St. Rep. 615.

The conclusion reached in those cases is fully sustained by the following cases (and many more might be cited), which are all "Turntable Cases," or cases in which the doctrine of those cases was involved: *Frost v. Eastern R. R. Co.*, 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396; *Delaware, etc., Ry. Co. v. Reich* (N. J.), 40 Atl. 682, 41 L. R. A. 837, 68 Am. St. Rep. 727; *Uttermohlen v. Boggs Run, etc., Co.* (W. Va.) 40 S. E. 410, 55 L. R. A. 911, 88 Am. St. Rep. 884; *Ryan v. Towar* (Mich.) 87 N. W. 644, 55 L. R. A. 310, 92 Am. St. Rep. 41; *Paolino v. McKendall* (R. I.) 53 Atl. 268, 60 L. R. A. 133, 96 Am. St. Rep. 736; *Dobbins v. Missouri, etc., Ry. Co.* (Tex.) 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856; *Savannah, etc., Ry. Co. v. Beavers* (Ga.) 39 S. E. 82, 54 L. R. A. 314.

The same conclusion was reached by this court in *Clark v. City of Richmond*, 83 Va. 355, 5 S. E. 369, 5 Am. St. Rep. 281. The city had made an excavation upon the land of another, into which a child of six years fell and was injured. In denying the child the right to recover in that case it was said, that where the excavation is so near the highway that a traveler, by making a false step or being affected by sudden giddiness, might be thrown into the excavation and injured, there would be a liability. "But if, in order to reach the place of danger, the party injured must become a trespasser upon the premises of another, the case will be different; for, in such a case, there is no breach of duty from which the liability to respond in damages can result."

But in some of the "Turntable Cases" the right to recover is maintained upon the doctrine of constructive invitation; that is, that if a person is allured or tempted by some act of a railroad company to enter upon its lands, he is not a trespasser, and it is held that leaving a turntable unfastened or unguarded, under

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circumstances similar to those disclosed by this record, is such an act.

One of the cases cited and relied on to sustain this contention is the case of *Bird v. Holbrook*, 4 Bing. 628. The defendant in that case, for the protection of his property, some of which had been stolen, set a spring gun without notice in a walled garden some distance from his house. The plaintiff, who climbed over the wall in pursuit of a stray fowl, having been injured, it was held that the landowner was liable. The express object in setting the spring gun was to inflict injury—to do an intentional wrong.

Another case relied on is that of *Townsend v. Wathen*, 9 East, 277. That was a case where a landowner had set traps on his premises near the highway, and baited them with decaying meat, so that its scent would extend not only to the highway, but beyond to the private premises of the plaintiff, whose dogs, scenting the meat, came upon the defendant's premises and were caught in a trap and thereby killed. It was held in that case that a man had no right to set traps of a dangerous description in a situation to invite, and for the very purpose of inviting, his neighbor's dogs, as it would compel them by their instinct to come into his traps. The act of the defendant in that case was not in the prosecution of his legitimate business; but, as the court said, was a mere malicious attempt, successful in its result, to entice his neighbor's animals upon his premises.

The gravamen of both these actions was the wrongful intention of the defendants. To liken the case of a railroad company erecting a turntable on its own premises for its own necessary purposes in the regular conduct of its business, with no desire or intention to injure any one, to the case of a landowner setting spring guns or traps on his land for the express purpose of doing an unlawful or malicious injury, is as it seems to us to lose sight of the difference between negligence and intentional wrongdoing. *Walsh v. Fitchburg, etc., R. Co.*, supra; *Dobbins v. Mo. Kansas & Tex. Ry. Co.* (Tex.) 41 S. W. 62, 38 L. R. A. 573, 576, 66 Am. St. Rep. 856.

"The viciousness of the reasoning," said the Court of Appeals of New Jersey, in the case of *Delaware, etc., R. Co. v. Reich*, supra, in discussing this question, "which fixes liability upon the landowner because the child is attracted, lies in the assumption that what operates as a temptation to a person of immature mind is, in effect, an invitation. Such an assumption is not warranted. As said by Mr. Justice Holmes (now a member of the Supreme Court of the United States), in *Holbrook v. Aldrich*, 168 Mass. 16, 46 N. E. 115, 36 L. R. A. 493, 60 Am. St. 364, 'Temptation is not always invitation. As the common law is understood by the most competent authorities, it does not excuse a trespass, because there is a temptation to commit it,' or hold parties bound to contemplate infraction of property rights, because the temptation to untrained minds to infringe them might have been foreseen."

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No landowner supposes for a moment that by growing fruit trees near the highway, or where boys are accustomed to play, however much they may be tempted to climb the trees and take his fruit, he is extending to them an invitation to do so, or that they would be any the less trespassers if they did go into his orchard because of the temptation. No one believes that a landowner, as a matter of fact, whether a railroad company or a private individual, who makes changes on his own land in the course of a beneficial user, which changes are reasonable and lawful, but which are attractive to children, and may expose them to danger if they should yield to the attraction, is by that act alone inviting them upon his premises.

This doctrine of constructive invitation is not sustained, as it seems to us, by the English cases cited to sustain it, and has been utterly rejected by the highest courts of New Hampshire, Massachusetts, New York, New Jersey, Rhode Island, Michigan, and West Virginia. In several other states it is limited in its operation to turntable cases. See *Frost v. Eastern, etc., Ry. Co.*, supra; *Daniels v. N. Y. & N. E. R. Co.*, supra; *Walsh v. Fitchburg, etc., R. Co.*, supra; *Delaware, etc., Ry. Co. v. Reich*, supra; *Uttermohlen v. Boggs Run, etc., Co.*, supra; *Ryan v. Towar*, supra; *Paolino v. McKendall*, supra; *Dobbins v. Missouri, etc., Ry. Co.*, supra; *Savannah, etc., Ry. Co. v. Beavers*, supra.

The maxim, "*Sic utere tuo ut alienum non lædas*," has been quoted in some of the "Turntable Cases," and relied on as affording a decisive reason, or ground, for establishing a duty upon the railway company, and as per se justifying a recovery against it. There may be more, but there is one conclusive answer to the argument based on that maxim, and that is, that it refers only to acts of the landowner, the effects of which extend beyond the limits of his property.

In *Deane v. Clayton*, 7 Taunton, 489, Gibbs, J., said: "I know it is a rule of law that I must occupy my own so as to do no harm to others, but it is their legal rights only that I am bound not to disturb, subject to this qualification I may occupy or use my own as I please. It is the rights of others, and not their security against the consequences of [their] wrongs that I am bound to regard."

In *Knight v. Abert*, 6 Pa. St. 472, 47 Am. Dec. 478, 479, where an effort was made to apply the maxim to sustain an action by the owner of cattle, which had trespassed upon the lands of another, and had been injured by reason of the unsafe condition of the property, Chief Justice Gibson said: "A man must use his property so as not to incommode his neighbor; but the maxim extends only to neighbors, who do not uninvited interfere with it, or enter upon it. * * * If it were not so, a proprietor could not sink a well, or a saw pit, dig a ditch or mill race, or open a stone quarry or a manhole on his land, except at the risk of being made responsible for conse-

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quential damage from it, which would be a most unreasonable requirement." *Ryan v. Towar*, at page 314, 55 L. R. A., page 648, 87 N. W. (92 Am. St. Rep. 41). See article by Judge Smith on Landowners' Liability to Children, etc., 11 Harvard Law Review, 349-373, 434, 448, in which there is a valuable discussion of that whole subject.

Upon neither of the grounds relied on do we think that the common law makes it the duty of a landowner to have his premises in a safe condition for the uninvited entry of adults or children, nor to take affirmative measures to keep them off of his premises or to protect them after entry; and this view is strengthened by the fact that so many of the courts which have adopted the doctrine of the "Turntable Cases" restrict it as far as possible to turntables, and refuse to follow it to its natural and logical consequences. For if it be a rule of the common law that a landowner, who in the reasonable and lawful use of his property, makes changes thereon which have the double effect of attracting young children to the land, and at the same time exposing them to serious danger, is guilty of negligence, unless he exercises reasonable care for their safety, either in keeping them off the land, or in protecting them after their entry thereon, the rule would apply, not only to railroad companies and their turntables, but to all landowners, who in the use of their land, maintain upon it dangerous machinery, or conditions which present a like attractiveness and temptation to children. The common law applies alike to all landowners under like conditions, and it would be an anomaly to hold that a doctrine or rule of the common law, which had its origin before there was either railroads or turntables, applies only to railroad companies in the use of their lands upon which they have dangerous machinery. While the courts should and do extend the application of the common law to the new conditions of advancing civilization, they may not create a new principle or abrogate a known one. If new conditions cannot be properly met by the application of existing laws, the supplying of the needed laws is the province of the legislature, and not of the judicial department of the government. *Connelly v. Western Union Tel. Co.*, 100 Va. 59, 40 S. E. 618, 56 L. R. A. 663, 93 Am. St. Rep. 919. The Legislature can change the common law as far as may be necessary to regulate the use of turntables and other dangerous appliances, and leave untouched the common-law rights of the ordinary landed proprietor.

The Court of Appeals of New Jersey, in refusing to follow the doctrine of the "Turntable Cases," said, that the doctrine would require a similar rule to be applied to all owners and occupiers of land in respect to any structure, machinery, or implement maintained by them, which presented a like attractiveness and furnished a like temptation to children. "He who erects a tower capable of being climbed, and maintains thereon a windmill to pump water; * * * he who leaves his moving machine, or

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dangerous agricultural implement, in his fields; he who maintains a pond in which boys may swim in summer, and on which they may skate in winter—would seem to be amenable to this rule of duty. Climbing, playing at work, swimming, and skating, are attractions almost irresistible to children, and every landowner or occupier may well believe that such attractions will lead young children into danger. Many other cases of like character might be imagined. In all of them, the Turntable Cases, if correct, would charge the owner * * * with the duty of taking care to preserve young children thus tempted on his farm from harm. The fact that the doctrine extends to such a variety of cases, and to cases in respect to which the idea of such a duty is novel and startling, causes strong suspicions of the correctness of the doctrine, and leads us to question it." Delaware, etc., R. Co. v. Reich, *supra*; Turess v. N. Y. etc., R. Co., 61 N. J. Law, 314, 40 Atl. 614; Uttermohlen v. Boggs Run, etc., Co., *supra*.

The Supreme Court of Minnesota, which was one of the first to give its adherence to the turntable doctrine (Keffe v. Milwaukee etc., Ry. Co., 21 Minn. 207, 18 Am. Rep. 393) in the subsequent case of Stendal v. Boyd, 73 Minn. 53, 75 N. W. 735, 42 L. R. A. 288, 72 Am. St. Rep. 597, though its Chief Justice said: "The doctrine of the 'Turntable Cases' is an exception to the rule of nonliability of a landowner for accidents from visible causes to trespassers on his premises, and if the exception is to be extended to this case [a dangerous excavation filled with water on a city lot, in which a little boy had been drowned],—then the rule of nonliability as to trespassers must be abrogated as to children, and every owner of property must at his peril make his premises child-proof."

We will conclude this opinion, with the following extract from the very able opinion of Judge Denman, speaking for the Supreme Court of Texas (another of the states which had followed the turntable doctrine) in the case of Dobbins v. Missouri, etc., Ry. Co., 41 S. W. 62, 38 L. R. A. 573, 66 Am. St. Rep. 856, as expressing our views: "The difficulty," he said, "about those cases [Turntable Cases] is that they either impose upon owners of property a duty not before imposed by law, or they leave to a jury to find legal negligence in cases where there is no legal duty to exercise care. In those cases the courts yielding to the hardships of individual instances where owners have been guilty of moral, though not legal wrongs, in permitting attractive and dangerous turntables and water holes to remain unguarded on their premises in populous cities, to the destruction of little children, have passed beyond the safe and ancient landmarks of the common law, and assumed legislative functions, imposing a duty where none before existed. As a police measure the law-making power may, and doubtless should, without unduly interfering with or burdening private ownership of land, compel the inclosure of pools, etc., situated on private property in such close

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proximity to thickly settled places as to be unusually attractive and dangerous, and impose criminal or civil liability, or both, for failure to comply with the requirements of such law. When such a duty is imposed the courts may properly enforce it or allow damages for its breach, but not before."

We are of opinion that there is no error in the judgment complained of, and that it should be affirmed,

CARDWELL, J., absent.

LOUISVILLE, H. & ST. L. RY. CO. v. ILLINOIS CENT. R. CO.

(Court of Appeals of Kentucky, May 1, 1906.)

[93 S. W. Rep. 4.]

Master and Servant—Relationship—Joint Employment—Negligence.*—A contract between plaintiff railroad company and defendant railroad company gave plaintiff the right to use defendant's tracks in a city for a certain compensation, and provided that each party should alone be responsible for all loss or damage caused by the fault of any employees or servants acting in its behalf. It was further provided that certain employees, including flagmen, should be selected, hired, and discharged by defendant; but plaintiff was required to pay a certain portion of their compensation. Held, that the flagmen were acting not only for defendant, but "in behalf of plaintiff," within the meaning of the contract, and hence plaintiff was not entitled to recover from defendant for damages caused by the negligence of a flagman.

Appeal from Circuit Court, Jefferson County, Common Pleas Branch, First Division.

"Not to be officially reported."

Action by the Louisville, Henderson & St. Louis Railway Company against the Illinois Central Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

Helm, Bruce & Helm, for appellant.

Trabue, Doolan & Cox, for appellee.

PAYNTER, J. The appellee owns a line of railway which crosses Main street, between Thirteenth and Fourteenth streets, in Louisville, Ky. By contract hereinafter referred to the appellant acquired the right to use appellee's track for the movement of its trains, cars, and engines. The railroad track at the point in question is intersected at right angles by the Louisville Railway Company's tracks used for the movement of its cars. At the date of the contract between appellant and appellee the latter had erected a gate at Main street for the protection of the public, and had employed a flagman for the

*For the authorities in this series on the question who are, and are not, employees of a railroad company, see foot-notes appended to *Weisser v. Southern Pac. Ry. Co. (Cal.)*, 18 R. R. R. 861, 41 Am. & Eng. R. Cas., N. S., 861.

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purpose of managing the gate. On December 15, 1904, a train of the appellant was being backed across Main street on appellee's track at the point stated, which collided with the street car of the Louisville Railway Company passing west on Main street at the point of intersection. The collision resulted in the injury of several persons on the street car. Numerous suits have been brought and claims asserted against the appellant and appellee. The record conduces to show that the injury resulted from the negligence of the flagman, who was employed and was paid as will be made to appear hereafter. The question submitted to the court is as to who shall sustain the loss occasioned by the collision mentioned.

So much of the contract as is pertinent to the question under consideration reads as follows: "(1) The party of the first part, in consideration of the covenants and agreements to be kept and performed by the party of the second part, hereby grants to the party of the second part an equal right with itself to run its trains over the tracks of the party of the first part between the said junction at West Point and Louisville, Kentucky, under the rules and regulations of the party of the first part in regard to the movement of trains, and further undertakes to furnish at Louisville the freight shed, freight yard, superintendent's office, use of short route tracks, and Union Depot; also the house and care for engines, to furnish water, fuel, and make light repairs on them, as has been the custom for the past few years at Louisville, Kentucky, upon the following terms and conditions: First. The party of the second part shall pay to the party of the first part as rent for the use of main track twelve thousand five hundred dollars (\$12,500) per annum, to be paid in equal semi-annual installments of six thousand two hundred and fifty dollars (\$6,250.00) on the first days of February and August of each year, and shall pay each month such proportion of the cost of maintaining, renewing, and repairing the said main track, bridges, fences, cattle guards, crossings, crossing watchmen, and switch lights as the number of cars and engines of the party of the first part bears to the whole number of cars and engines passing over the said track in the same month, each engine to be counted as three cars. In Louisville the party of the second part shall pay as rent for the freight shed, two hundred dollars (\$200.00) monthly; for the freight yard, two hundred dollars (\$200.00) monthly; for the superintendent's office, thirty dollars (\$30.00) monthly; for the short route tracks, one hundred dollars (\$100.00) monthly; for Union Depot, two hundred and fifty dollars (\$250.00) monthly; cost of depot house, twenty-five dollars (\$25.00) monthly. In addition to the above, the party of the second part shall pay each month such proportion of the cost of the maintenance and operation of the Union Depot as the number of its cars using the said depot shall bear to the entire number of cars using the same during such month. The water, fuel, housing of engines, and slight running repairs

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shall be continued at the customary prices for such services, if desired. Payment of the monthly rents, and for the monthly proportions of expenses herein provided for, shall be made on or before the fifteenth day of each calendar month for the preceding month. * * * Fourth. Each party shall be alone responsible for all loss or damage whether to persons or property, which may be caused by the fault of any employees or servants in its behalf, and shall fully protect the other party from all liability, loss, or expense by reason thereof, except as provided in the sixth section hereof. Fifth. The party of the second part assumes all risk of accidents to its trains, while running on the tracks of the party of the first part, which may be caused by defects in said track, bridges, or other fixtures and agrees to pay all loss or damage to persons or property which may be caused by or arise from such accidents, and to hold the party of the first part harmless therefrom. Sixth. The person having in charge the movement of trains shall be considered a joint employee of the parties hereto, and, in case of accident caused by wrong orders for such movement, each party shall bear damages caused to its own property and the persons and property of others in its trains. * * * The third clause in the contract provides that no person or persons objectionable to the Illinois Central Railroad Company shall be employed on the tracks or grounds after a written notice desiring his or their removal has been given the appellant.

In brief, the contention of appellant is that for compensation appellee undertook to render it the service of watching the street crossings and to protect it against accidents which may be caused by passing trains over the crossings. Consequently appellee is bound to protect it against any loss growing out of its failure to comply with its contract in this particular. For the appellee it is contended that under the express terms of the contract the crossing watchman was paid in part by appellant for his services and that he was a joint employee of both parties, and was acting on behalf of appellant when the accident happened. The court will not state in detail the arguments of counsel for appellant and appellee in support of their respective positions. It is not denied, nor could it be successfully done, that, as the appellee acquired the right to use the crossing in question, it owed a duty to the public, which required it to use proper care to protect persons using the streets at this crossing from injury from passing trains, and that duty did not cease in any respect by reason of the contract with appellant. On the other hand, the appellant by his contract with the appellee and the operation of trains thereunder assumed a duty to the public which required it to use proper care to protect persons from injury from its trains who used the street at the crossing. So the question for our determination is, which of the parties, as between themselves, should sustain the loss occasioned by the accident?

It will be observed that there is no clause in the contract providing that one of the contracting parties should in any event be liable for a loss occasioned by the other. In fact, there is not a word or sentence in the contract that suggests that such should be the case. By the first clause in the contract the appellant was to pay monthly such proportion of the cost of maintaining, renewing, and repairing the main track, bridges, fences, cattle guards, crossings, crossing watchmen, and switch lights as the number of cars and engines of the appellant bears to the whole number of cars and engines passing over the track in the same month. It is thus seen that the appellant assumed to pay what the parties agree is a just proportion of the costs of maintaining, renewing, and repairing crossings, and also the cost of maintaining crossing watchmen. The clause shows the contracting parties recognized there were crossings to be maintained and that crossing watchmen were likewise a necessity to protect the public from passing trains, the passengers transported by them, their employees on trains and their property. Each owed a duty to use proper care to protect the public at the crossings, and, in addition to that, each owed a duty to protect their passengers and employees from accidents at such crossings. This duty could only be performed by maintaining proper crossings, and at some of them crossing watchmen. It was as much the duty of a crossing watchman to protect the public and the appellant's passengers, employees, and its property when its trains passed over the crossing, as it was his duty to likewise protect the public and appellee's passengers, employees, and its property when its trains passed over the crossing. Each party had a corresponding duty to perform, and to enable each to perform it, it was necessary to keep crossing watchman at the point in question, and each agreed to pay part of the cost of keeping him. The fact that the appellee has the right to select the watchmen, and pay them with the contributions which each party has agreed to make, does not change the relation they sustain to them, nor does it add to or diminish or change the character of the duties which they are to perform for each. The mere fact that they are selected by appellee, and that their names are alone on its pay roll, does not show that they alone act for it in discharging their duty as watchmen. It was simply a matter of agreement as to how they should be selected and paid. Clause 4 provides that each party shall alone be responsible for all loss or damage, whether to person or property which may be caused by the fault of any employees or servants acting in its behalf, and shall fully protect the other party from all liability, etc., except as provided in the sixth section of the contract. It is not provided that each party shall be alone responsible for loss caused by the fault of its employees or servants, but for any employees or servants acting in its behalf. The watchman was a necessary employee, whose employment

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was the subject of agreement, and whose salary was in part paid by appellant, and was acting for it or in its behalf at the time its trains passed over the crossing. The parties recognized that the appellant was to use the track and bridges and to enjoy the protection which cattle guards and fences gave the appellant, so it agreed to pay the cost of maintaining them. The parties likewise recognized that crossings existed and watchmen would be needed at some of them for the protection of the appellee's trains and it from loss by damages caused by some one being injured at a crossing, if not properly guarded. Therefore it was agreed to be proper that appellant should pay part of the expenses of maintaining the watchman for its protection.

It is urged, as the sixth clause declares that the person having charge of the movement of trains—in other words, the train dispatcher—is the joint employee of the parties to the contract, therefore no one other employee was to be regarded as a joint employee. This contention is not sound. The train dispatcher occupied a peculiar relationship to the parties. He was employed by the appellee. He controlled the movement of both trains when both were using the track at the same time. As the result of his fault, there might have been a collision between the trains of appellant and appellee, or as the result of his fault there might be a collision between the trains of appellant, or between the trains of appellee, and in which collision there would be injury to property, and perhaps to passengers or employees. If such accidents happened, serious question might arise as to who should sustain the loss; hence it was quite important, owing to the fact that the dispatcher would be directing the movements of both trains, to specify particularly who was to bear the loss occasioned by such accidents. We do not think that this clause shows that the parties agreed there should be but one joint employee. The whole contract shows that each party was to be responsible for the losses occasioned by its acts or the acts of its employees, or any employee or servant acting in its behalf. It is our conclusion that the watchman was acting in behalf of the appellant when the accident happened, and it, and not the appellee, must sustain the loss occasioned thereby.

The judgment is affirmed.

JOHNSON v. LOUISVILLE & N. R. Co.

(Court of Appeals of Kentucky, March 27, 1906.)

[91 S. W. Rep. 707.]

Railroads—Injuries to Trespasser.*—A railroad operating stockyards owes no duty to keep a lookout for the safety of a mere trespasser or licensee in such yards, and is not liable for injuries received by one thrown from his buggy as the result of fright occasioned his horse by extraordinary noise ensuing on the collision of cars carelessly handled by employees of the road.

Same—Exception to Rule.†—The rule that a railroad owes no duty to a trespasser or licensee on its property to keep a lookout for his safety, except to save him from peril after the discovery thereof, if it can be done by the exercise of ordinary care, is subject to the qualification that in cities and towns it is the duty of those in charge of a train to keep a lookout and give warning of its approach, so that those who may with or without right be on the track may save themselves from injury.

Appeal from Circuit Court, Warren County.
"To be officially reported."

Action by A. C. Johnson against the Louisville & Nashville Railroad Company. Judgment for defendant, and plaintiff appeals. Affirmed.

B. F. Proctor, G. H. Hindman, and R. L. Greene, for appellant.

Benjamin D. Warfield and J. A. Mitchell, for appellee.

PAYNTER, J. The appellant seeks to recover damages because his horse became frightened and caused him to be thrown from his buggy and injured. He alleges that it was the result of the gross negligence of the defendant, its agents, and servants. The facts upon which he seeks a recovery may be summarized as follows: The appellee owned stockyards somewhere in the corporate limits of Bowling Green and a vacant lot adjoining them about as large as an ordinary square in a town. Upon this lot appellee had a side track over which cars were moved for the purpose of the shipment of stock. The track terminated on the vacant lot, but appellee did not have a butting post at the end of it. On the occasion in question a box car was standing near the end of the side track, which was kept on it by means of a cross-tie laid on the track. An engine with a number of box cars attached to it backed in on the side track and struck the box car with such violence that it was forced entirely beyond the end of the track, and the collision made such noise that it frightened appellant's horse and thus

*See foot-notes appended to *Hern v. Southern Pac. Co.* (Utah), 17 R. R. R. 179, 40 Am. & Eng. R. Cas., N. S., 179.

†For the authorities in this series on the subject of the care required of those in charge of trains to avoid injuring other users of streets, see foot-notes appended to *St. Louis S. W. Ry. Co. v. Underwood* (Ark.), 16 R. R. R. 134, 39 Am. & Eng. R. Cas., N. S., 134.

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caused the injury complained of. The evidence tends to show that the engine backed in at a rapid rate of speed, and caused the cars to collide with great force, and made a very loud and unusual noise. A friend of the appellant invited him to drive him to the stockyards, where he wanted to see a brother in regard to some financial matters. The appellant and his friend were both in the buggy, which had been standing for about five minutes on the vacant lot at a point between the box car and the entrance of the stockyards.

The appellant had no business whatever at the stockyards or with the appellee, but simply drove there at the invitation of his friend. His friend had no business with the appellee or at the stockyards with reference to any business conducted there. The appellant was either a trespasser or licensee upon appellee's vacant lot, as he was not there on any business connected with the stockyards or with the appellee. The appellee did not maintain the stockyards or keep its vacant lot for the pleasure of persons who might be led there by curiosity or for social enjoyment. They were maintained for business purposes, and those who were called there by business with the appellee were there as by invitation and the appellee owed them a duty to save them from injury by the negligence of its agents, servants, or employees. As the appellant was there as a trespasser or licensee, the appellee owed him no duty to keep a lookout for his safety. It was under no duty to him to see that its agents or servants were not guilty of negligence in the operation of its trains upon the side track. Of course, in making this statement, the court does not want to be understood as saying that, if those in charge of the train on the side track had discovered appellant on it, it would not have been their duty to have exercised ordinary care to have rescued him from his peril. The appellant, while on appellee's vacant lot as a licensee, cannot complain of the speed with which the train on the side track is operated, nor as to the manner in which the cars may be handled or bumped together. This court has uniformly held that the railroad company does not owe any duty to a trespasser or licensee, except to save him from his peril after it is discovered, if it can be done by the exercise of ordinary care. However, the rule is subject to this qualification that in cities and towns it is the duty of those in charge of a train to keep a lookout and give warnings of its approach, so that those who may, with or without right, be upon the track may be warned of the train's approach and thus save themselves from injury. This court has so often ruled in the manner above indicated that we deem it unnecessary to cite the cases. Depots are established and maintained for the use of those who have business with the railroad and for those who take passage on trains and for those who leave them. Stockyards are maintained for the purpose of the shipment of stock, and persons are invited there by the railroad

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company who desire to transact business for the conduct of which the yards are established. Depots must be maintained in a reasonably safe condition for the use of those who are called there to transact business with the railroad company. Likewise stockyards must be kept in a reasonably safe condition, and ordinary care must be exercised in their maintenance and use so as to avoid injuring persons who may be called there to transact business with the person or corporation owning or controlling them.

Thompson on Negligence, vol. 1, § 1004, reads as follows: "But persons using the station merely by permission or sufferance, for example, those taking shelter in a storm, cannot claim from the railroad company the exercise of even ordinary care: but they enjoy the license subject to its perils. Thus, it has been held that foot traveler, injured in the dark by falling through an open trapdoor while crossing the platform of a railroad station which the company allows people to use as a short cut between public streets, cannot recover damages from the company, although no light or barrier was placed at the opening. Similarly, a crowd having gathered at a railway station to witness the arrival of the President of the United States, the company was held not liable to one of this number who was injured by the breaking down of the platform, even though the floor was not in a proper state of repair for its ordinary use. One who desires to take passage upon the cars must exercise his right to enter and remain in a station house, in conformity with the due and reasonable regulations of the company as to his conduct while there; and he cannot exercise it until a reasonable time next prior to the departure of the train on which he intends to go. What is such a reasonable time depends upon the circumstances of each particular case. So, a person making a friendly visit to a telegraph operator in a railway station has no right of action for an injury received in consequence of the station being demolished by a collision of trains." In *Post v. Texas P. R. Co.*, 23 S. W. 708, the Court of Civil Appeals of Texas held that a railroad company is under no obligation to keep a platform about its depot in a safe condition for a boarding house keeper who goes there to meet incoming trains for the purpose of securing boarders. This conclusion is based upon the theory that, as no obligation or duty toward the plaintiff existed, the defendant could not be guilty of violating any obligation or duty towards the injured party. The same principle was enunciated in *Johnson v. Boston & Maine R. R. Co.*, 125 Mass. 75, and also in the case of *Pittsburg, Ft. Wayne & Chicago Ry. Co. and Pennsylvania R. R. Co. v. Emily Bingham, Administratrix*, 29 Ohio St. 364. Our conclusion is that the appellee did not owe appellant any duty at the time he received his injury; hence there could not have been a breach of duty by negligence in permitting the cars to collide with unusual force and noise.

The judgment is affirmed.

CENTRAL OF GEORGIA RY. CO. *v.* TURNER.

(Supreme Court of Alabama, Jan. 10, 1906.)

[40 So. Rep. 355.]

Railroads—Injuries to Animals—Evidence.*—That a cow was killed near a public road crossing by a passenger train running against her and knocking her from the track made out a prima facie case for the owner, and imposed on the railway company the burden of acquitting itself of negligence.

Same—Evidence—Questions for Jury.—In an action for the killing of a cow by a train, where the plaintiff made out a prima facie case, testimony that the train and engine were thoroughly equipped with the latest appliances for stopping a train; that it had a first-class headlight, which was burning when the engine struck the cow; that all parts were in good running order; that the engineer kept a steady lookout, and that the cow approached the track suddenly from the north side and was within 10 feet of the track, and 75 or 80 yards, from the engine when he discovered it approaching; that he blew the cattle alarm, put on the air brakes, reversed his engine, did everything he could to stop the train; and that the train could not have been stopped with safety to the passengers in a less distance than 300 yards—was not sufficient to warrant an affirmative charge in favor of the defendant.

Same—Instructions.—In an action for the killing of a cow by a train, charges on behalf of the railway company which did not postulate the fact that the engineer was keeping a proper lookout for animals on or in close proximity to the track, or that the train was properly equipped, were properly refused.

Appeal from Circuit Court, Barbour County; A. A. Evins, Judge.

"To be officially reported."

Action by H. J. Turner against the Central of Georgia Railway Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

This was an action by appellee to recover of appellant the value of a cow killed by defendant's train. The evidence for plaintiff made out a prima facie case under the statute. The engineer of the defendant testified that the train was a passenger train, and that said train and engine were thoroughly equipped with the latest appliances for stopping a train; that it had a first-class headlight which was burning at the time the engine struck the cow, and that all parts of the train were

*See foot-note appended to *Southern Ry. Co. v. Hoge* (Ala.), 17 R. R. R. 792, 40 Am. & Eng. R. Cas., N. S., 792; *Ramsbottom v. Atlantic Coast Line R. Co.* (N. Car.), 17 R. R. R. 776, 40 Am. & Eng. R. Cas., N. S., 776; foot-note appended to *Central of Georgia Ry. Co. v. McWhorter* (Ga.), 15 R. R. R. 470, 38 Am. & Eng. R. Cas., N. S., 470; *Alabama & V. R. Co. v. Boyles* (Miss.), 15 R. R. R. 431, 38 Am. & Eng. R. Cas., N. S., 431; *Beaudin v. Oregon Short Line R. Co.* (Mont.), 14 R. R. R. 208, 37 Am. & Eng. R. Cas., N. S., 208; *Central of Georgia Ry. Co. v. Dich* (Ga.), 14 R. R. R. 200, 37 Am. & Eng. R. Cas., N. S., 200; *Airikainen v. Houghton Co. St. Ry. Co.* (Mich.), 14 R. R. R. 178, 37 Am. & Eng. R. Cas., N. S., 178.

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in good running order and it was being properly run at the time the cow was killed; that he was keeping a steady lookout down the track, and that the cow approached the track suddenly from the north side and was within 10 feet of the track and 75 or 80 yards from the engine when he discovered it approaching; that he blew the cattle alarm, put on the air brakes, reversed his engine, and did everything he could, or that a skillful engineer could do, to stop the train; that, instead of crossing the track, the cow turned down the track, and went some 30 or 40 feet down the track before he struck it; that he was keeping a steady lookout down the track, and discovered the cow as soon as it could have been discovered, and as soon as it came within the radius of the headlight; that the train had just come down a grade and was running about 30 miles an hour, and could not have been stopped with any degree of safety to the train or its passengers in a less distance than 300 yards.

The defendant requested the court to give the following charges, separately in writing: "(1) If the jury believe from the evidence that the cow in question came suddenly from the right-hand side of the track, and so close in front of the train that the engineer could not stop the train in time to prevent the accident, then they must find for the defendant. (2) If the jury believe from the evidence that the cow in question came suddenly from the right-hand side of the track and so close to the train that the engineer could not stop the train or slow it down sufficiently in time to prevent the accident, then they must find for the defendant. (3) If the jury believe from the evidence in this case that the engineer was the only eyewitness to the way and manner in which the cow was killed, and if the jury further believe from the evidence that the testimony of said engineer as to the way and manner in which the cow was killed is true, then your verdict must be for the defendant. (4) If the jury believe from the evidence in this case that the engineer was at his post and in the discharge of his duty, and was exercising that degree of diligence which very prudent persons observe in the conduct of their own business, then simply because he failed to see the cow while it was on the right of way does not make the defendant liable for the accident." The court refused each of these charges.

G. L. Comer, for appellant.

A. H. Merrill, for appellee.

TYSON, J. The cow was killed near a public road crossing by the passenger train of defendant running against her and knocking her from the track. This made out a *prima facie* case for plaintiff, and imposed upon defendant the burden of acquitting itself of negligence. Code 1896, §§ 3440, 3443; *Sou. Ry. v. Reaves*, 129 Ala. 457, 29 South. 594; *A. G. S. Ry. Co. v. Boyd*, 124 Ala. 525, 27 South. 408. Under the testimony

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it is clear that the affirmative charge, requested by defendant, was properly refused. *L. & N. R. R. Co. v. Cochran*, 105 Ala. 354, 16 South. 797. Neither of the other charges refused to defendant postulated the fact that the engineer was keeping a proper lookout for animals on or in close proximity to the track, or that the train was properly equipped. *Central of Ga. Ry. Co. v. Stark*, 126 Ala. 368, 28 South. 411; *Sou. Ry. v. Reaves*, *supra*. They were therefore properly refused.

Affirmed.

DOWDELL, SIMPSON, and ANDERSON, JJ., concur.

ELGIN, J. & E. RY. CO. v. HOADLEY.

(Supreme Court of Illinois, Feb. 21, 1906. Rehearing Denied April 11, 1906.)

[77 N. E. Rep. 151.]

Trial—Direction of Verdict—Nature of Question.—A request by defendant for a peremptory instruction at the close of all the evidence raises the question whether there is any evidence which, with the inferences reasonably to be drawn therefrom, is sufficient to support a verdict for plaintiff.

Railroads—Accidents at Crossings—Actions—Sufficiency of Evidence—Proximate Cause.*—In an action against a railroad for death of a person engaged in trimming a lamp between tracks at a crossing, evidence held sufficient to authorize a finding that defendant's failure to ring a bell or blow a whistle on the engine which struck deceased, and to keep such bell ringing or whistle sounding, as required by Hurd's Rev. St. 1903, c. 114, § 68, was the proximate cause of the accident.

Same—Contributory Negligence.—In an action against a railroad for death of a person engaged in trimming a lamp between tracks at a crossing, evidence held sufficient to authorize a finding that deceased was not negligent in approaching so near the track as to be within the reach of the engine which struck him.

Same—Reliance on Signals.†—A person engaged in work about a railroad crossing may presume that the railroad will not run any of

*For the authorities in this series on the question, what is, and is not, the proximate cause of an injury, see foot-notes appended to *Ryan v. St. Louis Transit Co.* (Mo.), 18 R. R. R. 775, 41 Am. & Eng. R. Cas., N. S., 775; *Chicago City Ry. Co. v. Shaw* (Ill.), 18 R. R. R. 586, 41 Am. & Eng. R. Cas., N. S., 586; *Brammer's Adm'r v. Norfolk & W. Ry. Co.* (Va.), 18 R. R. R. 497, 41 Am. & Eng. R. Cas., N. S., 497.

†For the authorities in this series on the subject of the rights of persons about to cross railroad tracks to assume that those in charge of trains or cars will perform their duties, see foot-note appended to *Farrell v. Erie R. Co.* (C. C. A.), 16 R. R. R. 485, 39 Am. & Eng. R. Cas., N. S., 485 (right to presume that street car is not running at a speed prohibited by ordinance); *Atlanta & W. P. R. Co. v. Lovelace* (Ga.), 15 R. R. R. 150, 38 Am. & Eng. R. Cas., N. S., 150 (not bound to anticipate negligence in another); *Gosa v. Southern Ry.* (S. Car.), 11 R. R. R. 693, 34 Am. & Eng. R. Cas., N. S., 693 (duty of traveler to use senses and duty of railroad to give signals); *Birmingham Southern R. Co. v. Powell* (Ala.), 7 R. R. R. 806, 30 Am. & Eng. R. Cas., N. S., 806 (assumption that statutory precautions will be

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its engines or cars over the crossing without ringing a bell or sounding a whistle before the engine or cars reach the crossing, as required by Hurd's Rev. St. 1903, c. 114, § 68.

Negligence—Contributory Negligence—Proof of Absence.†—Freedom from contributory negligence need not be proven by direct testimony, but may be inferred from circumstances.

Railroads—Accidents at Crossings—Contributory Negligence.—Where a person was killed while working about a railroad crossing, and had been upon the crossing for some time before he met his death, any negligence on his part while going upon the crossing could not have contributed to his injury, nor relieve the railroad from liability for his death.

Appeal from Appellate Court, Second District.

Action by Bella B. Hoadley, as administratrix of the estate of George E. Hoadley, deceased, against the Elgin, Joliet & Eastern Railway Company. From a judgment of the Appellate Court, affirming a judgment for plaintiff, defendant appeals. Affirmed.

This was an action on the case, brought in the circuit court of Will county by Bella B. Hoadley, as administratrix of the estate of George E. Hoadley, deceased, against the Elgin, Joliet & Eastern Railway Company, appellant, to recover for the death of said George E. Hoadley, which was caused by one of appellant's switch engines at the crossing of appellant's railroad tracks and Maple street, just outside the corporate limits of the city of Joliet. The declaration, as originally filed, consisted of one count. Four additional counts were afterwards filed. The first two of the additional counts charged negligence on the part of appellant in failing to ring a bell or blow a whistle on the engine, and in failing to keep the bell ringing

observed by trainmen); *Meeks v. Ohio River Ry. Co.* (W. Va.), 5 R. R. R. 662, 28 Am. & Eng. R. Cas., N. S., 662; *Edwards v. Chicago & A. Ry. Co.* (Mo.), 2 R. R. R. 333, 25 Am. & Eng. R. Cas., N. S., 333 (right of traveler to rely on flagman's invitation to cross); *Dolph v. New York, etc., R. Co.* (Conn.), 2 R. R. R. 35, 25 Am. & Eng. R. Cas., N. S., 35 (right to rely on presence of flagman not required by law); *Woehrie v. Minnesota Transfer Ry. Co.* (Minn.), 19 Am. & Eng. R. Cas., N. S., 529 (reliance on performance of duty to give signals not contributory negligence); foot-notes appended to *Southern Ry. Co. v. Carroll* (C. C. A.), 16 R. R. R. 488, 39 Am. & Eng. R. Cas., N. S., 488 (contributory negligence as affected by failure to give signals); foot-note appended to *Stegner v. Chicago, etc., Ry. Co.* (Minn.), 17 R. R. R. 365, 40 Am. & Eng. R. Cas., N. S., 365 (reliance on performance of duty by gatemen) foot-note appended to *Farrell v. Erie R. Co.* (C. C. A.), 16 R. R. R. 485, 39 Am. & Eng. R. Cas., N. S., 485, foot-notes appended to *Vrooman v. North Jersey St. R. Co.* (N. J.), 15 R. R. R. 393, 38 Am. & Eng. R. Cas., N. S., 393 (right to assume that trains or cars will not be run at excessive speed).

†For the authorities in this series on the subject of the burden of proving contributory negligence, see foot-notes appended to *Choctaw, etc., Ry. Co. v. Doughty* (Ark.), 18 R. R. R. 665, 41 Am. & Eng. R. Cas., N. S., 665; foot-notes appended to *Hot Springs St. Ry. Co. v. Hildreth* (Ark.), 18 R. R. R. 168, 41 Am. & Eng. R. Cas., N. S., 168; *Peoples v. North Carolina R. Co.* (N. Car.), 18 R. R. R. 18, 41 Am. & Eng. R. Cas., N. S., 18.

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or the whistle sounding, as required by section 68 of chapter 114 of Hurd's Revised Statutes of 1903. These are the only counts necessary to be referred to here. Appellant filed the general issue and a trial was had before a jury, which resulted in a verdict for \$4,000 in favor of appellee. After overruling a motion for a new trial, the court entered judgment upon the verdict. Appellant appealed to the Appellate Court for the Second District, where the judgment of the circuit court was affirmed, and now prosecutes a further appeal to this court.

Appellee's intestate received the injuries which resulted in his death where the tracks cross Maple street, in the southern part of appellant's switchyards, outside the corporate limits of the city of Joliet. That street is one of the principal highways leading into Joliet. The tracks were 14 in number. There was a space about 17 feet in width between two of these tracks, near the middle of the intersection. In this space were located two poles, one on the north side of the highway and the other on the south side, between the tops of which was extended a cable which supported an electric arc lamp. This cable was almost parallel with the railroad tracks. The poles and lamp belonged to the Economy Light & Power Company of Joliet and were parts of its electric lighting system. The lamp could, by means of a windlass located on the pole on the north side of the highway, be lowered to the ground for the purpose of changing the carbons or repairing or cleaning the lamp, and could then, by means of the windlass, be raised to a sufficient height above the ground so as not to interfere with travel on the highway. When the lamp was lowered to the ground it was a little more than 7 feet from the east rail of the track next west of it and about 10 feet from the west rail of the track next east of it. Hoadley had been attending to this lamp for the Economy Light & Power Company, as an employee, for about five months prior to the time he was injured. His duties required him to lower the lamp each day for the purpose of changing the carbons, which is referred to as "trimming the lamp." On February 4, 1902, between 8 and 9 o'clock in the forenoon, he lowered the lamp to trim it. While he was thus engaged, two engines attached to a freight train stood on the crossing on the track next east of him. He performed his work while standing on the west side of the lamp. Shortly before he was injured one of these engines discharged a large quantity of steam, which enveloped him so that he could not be seen by persons near by. The entire crossing for some time was obscured by the steam escaping from the engine. While the crossing was in this condition, a switch engine drawing a train of freight cars and belonging to appellant came out of the yards from the north upon the track immediately west of Hoadley, and approached the Maple street crossing at the rate of about eight miles an hour, without ringing a bell or sounding a whistle, as the evidence tends to show. When it reached a point on the crossing

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near the lamp it struck Hoadley, inflicting the injuries from which he died.

At the close of all the evidence in the case the defendant offered, and the court refused, an instruction directing the jury to return a verdict finding the defendant not guilty. The refusal of this instruction is assigned as error. The only other ground urged for reversal is the action of the circuit court in giving appellee's first instruction.

J. L. O'Donnell and T. F. Donovan (Knapp, Haynie & Campbell, of counsel), for appellant.

Donahoe, McNaughton & McKeown, for appellee.

SCOTT, J. (after stating the facts). The peremptory instruction offered by appellant at the close of all the evidence in the case presents the question whether there is in this record any evidence which, with the inferences reasonably to be drawn therefrom, is sufficient to support a verdict for the plaintiff. *Illinois Central Railroad Co. v. Swift*, 213 Ill. 307, 72 N. E. 737; *Indiana, Illinois & Iowa Railroad Co. v. Otstot*, 212 Ill. 429, 72 N. E. 387. There is evidence in the record to the effect that Hoadley, on the morning of February 4, 1902, was engaged in trimming the lamp, in the space between two of appellant's railroad tracks, at the crossing of those tracks with Maple street; that while he was so engaged one of appellant's engines, which was standing immediately east of him at a distance of only 10 feet, discharged large quantities of steam; that this steam covered the crossing, and was so dense as to prevent persons standing near by from seeing Hoadley, as he was enveloped in the steam; that when last seen before the accident he had finished trimming the lamp and was in the act of going to the pole on the north side of the highway; that while the crossing was covered with the steam to such an extent as to prevent the fireman and engineer on the switch engine from seeing Hoadley or any other person then on the crossing, the switch engine came out of the switch yards from the north towards the crossing, on the track immediately west of Hoadley, without ringing a bell or sounding a whistle, and the pilot beam of the switch engine, which projected a distance of about 2 feet east of the track, struck Hoadley, causing the injuries from which he died. We do not think that the fact that Hoadley was well acquainted with the surroundings, or the fact that he had been previously warned of the dangerous character of the crossing by appellant's servants, excused appellant from the performance of its statutory duty toward him, or that such facts show that Hoadley was guilty of contributory negligence in going so close to the track as to be struck by the passing engine, when he had no reason to believe, so far as the evidence discloses, that any engine was then approaching the crossing.

Appellant argues that Hoadley voluntarily assumed a position, in performing his work, which he knew to be dangerous, when

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there was a safe position in which the work could have been done, and by reason of assuming that dangerous position was injured. Its argument in this regard is based on the evidence of one of its witnesses, who testified that at the time Hoadley was struck by the engine he was stooping over at work on the lamp, with his back to the west, and that his hips were thrown backwards so as to be within reach of the pilot beam of the switch engine. Another witness, however, who gave evidence on behalf of appellee, testified that when he last saw Hoadley he had finished trimming the lamp, and that he had raised up and was in the act of going to the pole on the north side of the highway, and that the steam then shut off any further view of Hoadley until after the accident. This testimony is inconsistent with the theory that Hoadley was struck while stooping over at work on the lamp, and, for the purpose of considering the action of the court in refusing the peremptory instruction, must be taken as true. The evidence, therefore, does not show that the position taken by Hoadley was any more dangerous than that assumed by any person who finds it necessary to approach near, or cross over, a railroad track upon which engines and cars frequently pass.

We think that the jury could reasonably infer from the evidence that Hoadley, after he had finished trimming the lamp, took a few steps to the west in order to get away from the dense steam with which, at a distance of only 10 feet from its source, he was necessarily surrounded, with the intention of going to the pole on the north side of the highway, where his duties would next call him, for the purpose of using the windlass, and thus came in such close proximity to the track next west of him that he was within reach of the pilot beam of the engine. Under these circumstances there was evidence sufficient to warrant the jury in finding that the failure of appellant to give the warning required by the statute was the proximate cause of the injury, and that Hoadley was not himself negligent in approaching so near the west track as to be within reach of some part of the passing engine. Hoadley had a right to be on the crossing in question in order to perform his work of trimming the lamp. He also had a right to presume that appellant would not run any of its engines or cars over that crossing without giving him notice thereof by ringing a bell or sounding a whistle before the engine or cars reached the crossing. *Illinois Terminal Railroad Co. v. Mitchell*, 214 Ill. 151, 73 N. E. 449. The jury might, from the evidence, reasonably conclude that, if such warning had been given in this instance, Hoadley would have remained at a safe distance from any of the tracks at the crossing until the engine or train had passed.

Appellant contends that there is no proof of the exercise of due care on the part of Hoadley. Circumstances are in evidence from which due care may be inferred. That is sufficient proof. Direct testimony on this issue is not required. *Chicago & At-*

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lantic Railway Co. v. Carey, 115 Ill. 115, 3 N. E. 519; North Chicago Street Railroad Co. v. Rodert, 203 Ill. 413, 67 N. E. 812.

Appellant complains of the action of the court in giving appellee's first instruction. This instruction told the jury that, if they found certain facts from the evidence, then the plaintiff was entitled to recover. The objection urged to the instruction is confined to that part referring to the care exercised by Hoadley. The hypothesis in the instruction on that subject is as follows: "And if the jury further believe, from the evidence, that the said George E. Hoadley was in the exercise of ordinary care for his own safety while he was upon said highway at said railroad crossing and at the time he received the injuries aforesaid." It is said that this instruction limits the exercise of due care on the part of Hoadley to the time of the injury, and ignores the care required of him in going upon the crossing and in placing himself in such close proximity to the track as to be struck by an engine passing thereon.

The instruction not only requires the jury to find that Hoadley was in the exercise of ordinary care for his own safety at the time he was injured, but also requires them to believe, from the evidence, that he was in the exercise of such care during all the time he was upon the highway at the crossing, in order for them to return a verdict for the plaintiff. He was not injured while going upon, or passing over, the crossing. The evidence for both appellant and appellee shows that he had been upon the crossing for some time before he was struck by the engine. Any negligence on his part while going upon the crossing could not have contributed to the injury. It was, therefore, not necessary for the jury to believe that he was in the exercise of due care while going upon the crossing in order for the plaintiff to recover. After he was upon the crossing, however, under the circumstances of this case, it was then his duty to use due care to avoid the injury which he there received. This duty is definitely stated in the instruction, which requires the jury to believe that he was in the exercise of due care "while he was upon said highway at said railroad crossing." This clause of the instruction requires the jury to find that Hoadley was in the exercise of due care in taking or assuming a position so close to the track as to be struck by the switch engine, before they can return a verdict for the plaintiff.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

HAMILTON *v.* DETROIT, G. H. & M. RY. CO. *et al.*

(Supreme Court of Michigan, Nov. 21, 1905.)

[105 N. W. Rep. 82.]

Railroads—Injuries to Trespassers—Children Playing in Yards.*—

A railroad is not liable for injuries resulting from switching operations to a child playing in its yards, in the absence of evidence that the switching crew had, or should have had, knowledge of the presence of the child or of his companions.

Error to Circuit Court, Wayne County; George S. Hosmer, Judge.

Action by Frederick Hamilton, by his next friend, against the Detroit, Grand Haven & Milwaukee Railway Company and another. There was a judgment for defendant, and plaintiff brings error. Affirmed.

Argued before MOORE, C. J., and McALVAY, GRANT, BLAIR, and OSTRANDER, JJ.

Lehmann & Riggs, for appellant.

H. Geer, for appellees.

GRANT, J. Plaintiff, when 6 years and 10 months old, went with some other children into the yard of the defendant railway companies in the city of Detroit in which were standing freight and flat cars. He, with the other children, was playing on or around a flat car. A switch engine backed down upon the siding, and moved the car under or upon which the plaintiff was playing. In some way not apparent plaintiff got under a wheel and had his arm crushed. For this injury plaintiff brought suit, alleging in his declaration that the defendants had knowledge of his presence, and that it was their duty to remove him from the yard before moving their cars. There is no evidence that the switching crew had, or should have had, knowledge of the presence of plaintiff or any of his companions. A further statement of facts is unnecessary. The court directed a verdict for the defendants.

The case, both in its facts and the law, is ruled by *Katzinski*

*For the authorities in this series on the subject of the care due children on railroad tracks or premises, see foot-notes appended to *Katzinski v. Grand Trunk Ry. Co.* (Mich.), 17 R. R. R. 381, 40 Am. & Eng. R. Cas., N. S., 381; *Mattson v. Minnesota & N. W. R. Co.* (Minn.), 16 R. R. R. 502, 39 Am. & Eng. R. Cas., N. S., 502; *Pollock v. Pennsylvania R. Co.* (Pa.), 16 R. R. R. 764, 39 Am. & Eng. R. Cas., N. S., 764.

For the authorities in this series on the subject of the negligence of railroad companies in maintaining things dangerous and attractive to children, and in failing to warn them of the danger, see foot-note appended to *Berg v. Minneapolis & St. L. R. Co.* (Minn.), 17 R. R. R. 616, 40 Am. & Eng. R. Cas., N. S., 616; foot-notes appended to *Mattson v. Minnesota & N. W. R. Co.* (Minn.), 16 R. R. R. 502, 39 Am. & Eng. R. Cas., N. S., 502; *Dalin v. Worcester Con. St. Ry. Co.* (Mass.), 16 R. R. R. 476, 39 Am. & Eng. R. Cas., N. S., 476.

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v. Grand Trunk Ry. Co. (Mich.) 104 N. W. 409, and authorities there cited. See, also, *Trudell v. Railway Co.*, 126 Mich. 73, 85 N. W. 250, 53 L. R. A. 271.

Judgment affirmed.

MOORE, C. J. and MCALVAY and OSTRANDER, JJ., concurred.

BLAIR J. I concur, on the ground that no negligence was shown on the part of defendant.

REID v. ATLANTA & C. AIR LINE RY. CO.

(Supreme Court of North Carolina, Nov. 28, 1905.)

[52 S. E. Rep. 307.]

Railroads—Collisions at Street Crossing—Negligence.*—A railroad company is negligent in backing an engine over a street crossing at night without any warning and without a man with a light on it to keep a lookout along the track.

Same—Contributory Negligence—Last Clear Chance.†—In an action against a railroad company for negligent death resulting from a collision on a crossing, the defense of contributory negligence was not available, where there was a negligent failure of its employees to avail themselves of the last chance of avoiding the injury.

Appeal from Superior Court, Mecklenburg County; Cooke, Judge.

Action by James Reid, as administrator, against the Atlanta & Charlotte Air Line Railway Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Civil action for wrongfully and negligently causing the death of plaintiff's intestate. The usual issues in such cases were submitted. There was evidence to the effect that on or about February 24, 1905, about 8 o'clock at night, the plaintiff's intestate was run over and killed by an engine of the defendant; and there was evidence tending to show that at the time of the killing the intestate was endeavoring to cross the railroad at Second street crossing in the city of Charlotte, that there were several tracks there used by the defendant in shifting and otherwise, that the street ran down these tracks for some distance, and it was usual and customary for persons who were passing over the crossing at this point to walk part of the way down the main line of the track, and the intestate was at such point at the time she was run over and killed. The evidence of the

*For the authorities in this series on the subject of the precautions to be observed in kicking, backing and switching cars at crossings, see foot-note appended to *Chicago Terminal Transfer R. Co. v. Walton* (Ind.), 16 R. R. R. 456, 39 Am. & Eng. R. Cas., N. S., 456.

†For the authorities in this series for, or against, the "last clear chance" doctrine, see foot-note appended to *McLean v. Omaha & C. B. Ry. & Bridge Co.* (Neb.), 16 R. R. R. 119, 39 Am. & Eng. R. Cas., N. S., 119.

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plaintiff tended further to show that, at the time intestate was killed, the engine was backed on the crossing and ran over the intestate without warning of any kind, without any light on the front end as the train moved, and without any one stationed so as to give warning if danger or collision was imminent. There was evidence of the defendant that at the time of the injury the bell was rung, a light was properly placed, and a lookout kept. Under the charge of the court there was a verdict and judgment for plaintiff, and defendant excepted and appealed.

W. B. Rodman, for appellant.

Pharr & Bell, for appellee.

HOKE, J. The charge of the judge below was full and clear. The jury have accepted the plaintiff's version of the occurrence, and there is no error presented which gives the defendant any just ground of complaint. The court in substance told the jury that, where an engine was backing on a crossing in the night-time, it was the duty of the engineer to sound adequate warning and to keep a man with a light at the front of the engine as it was moving, so as to keep a lookout adequate for safety; and, if there was failure in this respect and an injury resulted, there would be a negligent breach of duty; and, if these duties were performed, there was no negligence on the part of the defendant, and the first issue would be answered "No." This is the rule laid down in *Purnell's Case*, 122 N. C. 832, 29 S. E. 953. There *Furches, J.*, delivering the opinion said: "As we understand the matter, there must be both a man and a light at night, and a man and a flag in the day. It may be one person, but he must have a light." The fact that the crossing may also be used as a part of the railroad yard, or that this term was used by the court under the circumstances of the present case, does not at all change the principle.

On the first issue as to contributory negligence the court charged the jury, among other things: "(3) It is the duty of persons, before going upon the track of a railroad company, to stop and look and listen for any train that may be moving, or, being upon the tracks of such company in its yards where there are several tracks used for shifting cars, to be continually alert and on the lookout for a moving train; and if a person fails in this duty, and in consequence of such failure is injured by a moving train, the person would be guilty of contributory negligence. (4) The burden of the first issue is upon the plaintiff; the burden of the second issue is upon the defendant." The court further charged the jury as follows: "(5) If the jury shall find that the plaintiff was walking on the railroad track, and that the defendant was backing its engine along the track in the nighttime in the direction of the plaintiff, and that there was no light at the time on the back part of the engine and no agent there to keep a lookout along the track, or, being there, failed to exercise reasonable care in looking ahead along the track for any person on

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or near the track, or that no bell was ringing, and if the jury shall find that the engine so moving ran against or upon the intestate and killed her, and if the jury should further find that, if the bell had been ringing and there had been a proper light on the engine, the intestate would have had notice of the approaching train in time and would have escaped the danger, or that if there had been a person stationed on the engine and was exercising reasonable care in keeping a lookout along the track, he would have discovered the intestate in time to have avoided striking her, then the jury should answer the first issue 'Yes' and the second issue 'No'. (6) If the jury are not satisfied by the greater weight of the evidence that the intestate was killed by a moving train or engine of the defendant, they will answer the first issue 'No.' "

Objection is made to section 5 of the charge, for that it practically declared that the defense of contributory negligence would not avail the defendant under the conditions stated. This part of the charge does have the effect complained of, and there is no error in the ruling. The intestate had gone to the crossing at Third street in the effort to cross the road, and was told by an employee of the defendant that a freight train then obstructed the crossing at that point, and she had better try the Second street crossing. Following these instructions she essayed the latter crossing and was endeavoring to cross, when the engine backed upon her, and her death resulted.

The intestate here was no trespasser, and there was no contributory negligence in the mere fact that she was then upon the road. She was where she had a right to be; and, if she was run over and killed by the engine, under the circumstances stated in this portion of the charge, there was no contributory negligence. Upon either postulate of the specified portion of the charge, there was a negligent failure on the part of the defendant's agents or employees to avail themselves of the last clear chance of avoiding the injury, which would render the misconduct of the defendant the sole proximate cause of the intestate's death. The case is controlled by the decisions in *Lloyd v. Railroad*, 118 N. C. 1010, 24 S. E. 805, 54 Am. St. Rep. 764; *Stanley v. Railroad*, 120 N. C. 514, 27 S. E. 27; *Purnell v. Railroad*, 122 N. C. 832, 29 S. E. 953; *McIlhaney v. Railroad*, 122 N. C. 995, 30 S. E. 127.

There is no error, and the judgment must be affirmed.

HEYING *v.* UNITED RYS. & ELECTRIC CO. OF BALTIMORE.

(Court of Appeals of Maryland, Jan. 12, 1905.)

[59 Atl. Rep. 667.]

Contributory Negligence—Attempt to Cross in Front of Street Car.—One who, on arriving at the intersection of streets, looks, but, seeing no street car, proceeds to cross the track, but, before crossing, looks again, and, though seeing a car coming, hurries and tries unsuccessfully to cross before it arrives, is guilty of contributory negligence.

Harmless Error.—Any error in not submitting the question of negligence is harmless, contributory negligence being conclusively shown.

Right of Motorman to Assume That Person Will Keep out of Danger.*—A motorman, seeing one driving a team toward the street car track, a short distance from an approaching car, and just before driving on the track, has a right to assume she will stop in a place of safety.

Appeal from Court of Common Pleas; Henry Stockbridge, Judge.

Action by Caroline Heying against the United Railways & Electric Company of Baltimore. Judgment for defendant. Plaintiff appeals. Affirmed.

Argued before McSHERRY, C. J., and FOWLER, BRISCOE, BOYD, PEARCE, and SCHMUCKER, JJ.

Myer Rosenbush, for appellant.

Arthur D. Foster and *Geo. Dobbin Penniman*, for appellee.

FOWLER, J. Caroline Heying brought this suit against the United Railways & Electric Company of Baltimore City to recover damages for serious bodily injury which she suffered while driving her milk wagon on one of the streets of Baltimore

*As to the right of those operating street cars or trains to assume that persons on or near tracks will avoid danger, see foot-note appended to *Simpson v. Rhode Island Co.* (R. I.), 12 R. R. R. 642, 35 Am. & Eng. R. Cas., N. S., 642.

As to the care required of those in charge of street cars to avoid collisions with other users of streets, see foot-note appended to *Rawitzer v. St. Paul City Ry. Co.* (Minn.), 13 R. R. R. 91, 36 Am. & Eng. R. Cas., N. S., 91; *Anniston Elec. & Gas Co. v. Hewitt* (Ala.), 12 R. R. R. 312, 35 Am. & Eng. R. Cas., N. S., 312; *Forrestal v. Milwaukee Elec. Ry. & L. Co.* (Wis.), 11 R. R. R. 814, 34 Am. & Eng. R. Cas., N. S., 814; *Warner v. St. Louis, etc., R. Co.* (Mo.), 11 R. R. R. 809, 34 Am. & Eng. R. Cas., N. S., 809; *North Chicago St. R. Co. v. Johnson* (Ill.), 11 R. R. R. 774, 34 Am. & Eng. R. Cas., N. S., 774; *South Covington & C. St. Ry. Co. v. McHugh* (Ky.), 11 R. R. R. 760, 34 Am. & Eng. R. Cas., N. S., 760; *Haas v. New Orleans Rys. Co.* (La.), 11 R. R. R. 442, 34 Am. & Eng. R. Cas., N. S., 442; *Coessens v. Rapid Ry. Co.* (Mich.), 11 R. R. R. 382, 34 Am. & Eng. R. Cas., N. S., 382; *Jett v. Central Elec. Ry. Co.* (Mo.), 11 R. R. R. 227, 34 Am. & Eng. R. Cas., N. S., 227; *Cameron v. Jersey City, etc., Ry. Co.* (N. J.), 11 R. R. R. 226, 34 Am. & Eng. R. Cas., N. S., 226.

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City. The facts as they appear in the record are: That between 5:30 and 6 o'clock on the morning of December 13, 1902, the plaintiff was driving up Columbia avenue to Cross street, and up Cross street to Sharp street. That, as she came to the corner of Sharp and Cross streets, she looked up both sides, but she didn't see the car coming, and she hurried up as quick as she could, and the car struck the rear end of the wagon. That when she looked the second time the car was a good ways from her. She couldn't tell how far, but it was closer to Hamburg street than to Cross street. That she hurried over as quickly as she could. "She tried her best, but she couldn't get over. The wagon was smashed completely to pieces, and she was knocked senseless." On cross-examination the plaintiff testified that when she arrived at the corner of Sharp and Cross streets she looked in both directions, up and down Sharp street, on which the cars ran, and, seeing no car, she proceeded to cross the track. But she testified that before crossing she looked again, and, in spite of the fact that she saw the car coming, she hurried and tried to get across before the car could get to the crossing.

In our opinion, this is a clear case of contributory negligence. It is apparent from all the evidence that the car must have been a very short distance from the corner when the plaintiff, with a reckless disregard of her safety, or, perhaps more likely, a want of appreciation of her danger, drove directly on the track in front of the car. Nor is there any evidence to show that after the motorman saw her in a place of danger, or could have so seen her by the exercise of any—even the greatest—degree of care, he could have stopped the car in time to avoid the collision.

As has often been said, the defense of contributory negligence admits some degree of negligence on the part of the defendant. But in this case the defendant does not appear to have been at fault, and the court so instructed the jury, by granting defendant's first prayer, by which they were told that there was no legally sufficient evidence of negligence on the part of the defendant. But if we should assume there was some such evidence which ought to have gone to the jury, still, if the plaintiff was guilty of contributory negligence, the question of negligence *vel non* on the part of the defendant becomes immaterial, for, if there was no negligence on its part, there can be no recovery, and, if there was, the same result would follow, because of the plaintiff's contributory negligence. But as we have seen, her own testimony was sufficient to justify a verdict and judgment for the defendant. She was asked this question, "You looked, and you saw the car coming, and, instead of stopping and waiting, you hurried and drove right on the track?" And she answered, "Yes, sir." We do not deem it necessary to apply to the facts of this case the well-settled principles so frequently announced by us. It is only one more case

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where the injury was caused by an error of judgment. The plaintiff can hardly be supposed to have been so reckless or to have had so little judgment as to have attempted to cross when the car was so close to the crossing as it proved in fact to be. As was said in *Thomas v. Pass. Ry. Co.*, 132 Pa. 505, 19 Atl. 286, "She would seem to have taken the chances and assumed the risk," or, as we said in *Meidling's Case*, 97 Md. 77, 54 Atl. 612. If the calculation the plaintiff made in regard to the distance the car was from the crossing had been correct, she doubtless would not have been injured, but she was in error, and she ought to have known she was likely to make a mistake in this respect, because the accident happened on a dark, foggy morning in the middle of December. But upon the whole case it would appear as though the plaintiff was running a race with the defendant's car, and it was her misfortune that she and the car arrived at the crossing at the same time. In this connection, it must not be forgotten that, assuming (and there is no proof of it) that the motorman saw the plaintiff just before she drove on the track, he had a right to assume she would stop in a place of safety.

Being of opinion the case was properly withdrawn from the jury, the judgment will be affirmed.

Judgment affirmed, with costs.

HANSON v. MANCHESTER ST. RY.

(Supreme Court of New Hampshire, Hillsborough, Nov. 7, 1905.)

[62 Atl. Rep. 595.]

Appeal—Review—Presumptions.—Where, in an action for injuries, the jury were not directed to pass on certain evidence, it would be presumed on appeal that such evidence was true, and would have established in the hands of the jury everything it tended to prove.

Negligence—Contributory Negligence—Injuries—Last Clear Chance—Proximate Cause.*—If a person is injured, in part by the negligence of another and in part by the insufficiency of the driver, horse, or carriage by which the person injured was being conveyed, which insufficiency was due to his own want of care in selecting them, no recovery could be had, not because the driver's negligence, or the

*For the authorities in this series on the question what is, and is not, the proximate cause of an injury, see foot-notes appended to *Greenawaldt v. Lake Shore & M. S. Ry. Co.* (Ind.), 17 R. R. R. 816, 40 Am. & Eng. R. Cas., N. S., 816; *Gilliam v. Texas & P. Ry. Co.* (La.), 17 R. R. R. 786, 40 Am. & Eng. R. Cas., N. S., 786; foot-notes appended to *Ramsbottom v. Atlantic Coast Line R. Co.* (N. Car.), 17 R. R. R. 776, 40 Am. & Eng. R. Cas., N. S., 776; *St. Louis & S. F. R. Co. v. League* (Kan.), 17 R. R. R. 772, 40 Am. & Eng. R. Cas., N. S., 772; *Alabama Great So. Ry. Co. v. Vail* (Ala.), 17 R. R. R. 718, 40 Am. & Eng. R. Cas., N. S., 718; *Lewis v. Vicksburg, etc., Ry. Co.* (La.), 17 R. R. R. 714, 40 Am. & Eng. R. Cas., N. S., 714; foot-notes appended to *Phillips v. Durham & C. R. Co.* (N. Car.), 17 R. R. R. 704, 40 Am. & Eng. R. Cas., N. S., 704; *Anderson v. Southern Ry.*

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defect in the horse, harness, or carriage, was imputable to the person injured, but because his own fault in selecting them was the proximate cause of the injury.

Street Railroads—Persons in Street—Injuries—Last Clear Chance—Proximate Cause.†—Where, in spite of plaintiff's negligence in selecting an incompetent driver, defendant street car company by the exercise of care could have prevented injury to plaintiff in the position he occupied in the care of such driver, defendant's failure to do so constituted the sole cause of the injury, for which plaintiff was entitled to recover, notwithstanding his prior negligence in selecting such driver or the driver's negligence at the time of the accident.

Same—Instructions.—Plaintiff was injured in a collision with a street car while he was being driven in a carriage by a driver claimed to have been negligent and intoxicated. There was evidence that, notwithstanding the driver's negligence and condition, the accident could have been prevented by defendant's motorman by the exercise of ordinary care, but the court charged that plaintiff's previous negligence in riding with such driver, or his misconduct in getting drunk, were not matters which would excuse defendant, if at the time of the accident plaintiff was doing all that prudence required of a person in his situation, and that in law plaintiff's prior negligence merely furnished an occasion for defendant to negligently injure him, and that its fault would be the legal cause of the accident, and the fact that the driver was drunk and was grossly negligent would be no defense; the question being, could plaintiff, at the time of the accident, have avoided the effect of the driver's fault by the use of ordinary care? Held, that such instruction was objectionable, as tending to mislead the jury in determining whether the insufficiency or negligence of the driver or defendant's failure to prevent the accident was the proximate cause thereof.

(S. Car.), 17 R. R. R. 701, 40 Am. & Eng. R. Cas., N. S., 701; foot-notes appended to *Illinois Cent. R. Co. v. Watson* (Miss.), 17 R. R. R. 199, 40 Am. & Eng. R. Cas., N. S., 199; foot-notes appended to *Birmingham Ry., etc., Co. v. Hinton* (Ala.), 17 R. R. R. 173, 40 Am. & Eng. R. Cas., N. S., 173; foot-notes appended to *Peerless Mfg. Co. v. New York, etc., R. R.* (N. H.), 17 R. R. R. 13, 40 Am. & Eng. R. Cas., N. S., 13; foot-notes appended to *Shamblin v. New Orleans & N. W. R. Co.* (La.), 16 R. R. R. 528, 39 Am. & Eng. R. Cas., N. S., 528; *Fishburn v. Burlington & N. W. Ry. Co.* (Iowa), 16 R. R. R. 444, 39 Am. & Eng. R. Cas., N. S., 444; *Pharr v. Morgan's L. & T. R. & S. Co.* (La.), 16 R. R. R. 434, 39 Am. & Eng. R. Cas., N. S., 434; *Southern Ry. Co. v. Williams* (Ala.), 16 R. R. R. 429, 39 Am. & Eng. R. Cas., N. S., 429; *Smith v. Fordyce* (Mo.), 16 R. R. R. 378, 39 Am. & Eng. R. Cas., N. S., 378; foot-notes appended to *Dean v. Oregon R. & Nav. Co.* (Wash.), 16 R. R. R. 237, 39 Am. & Eng. R. Cas., N. S., 237.

For the authorities in this series on the subject of imputed negligence, see foot-notes appended to *Colorado & S. Ry. Co. v. Thomas* (Colo.), 17 R. R. R. 167, 40 Am. & Eng. R. Cas., N. S., 167; foot-notes appended to *Markowitz v. Metropolitan St. Ry. Co.* (Mo.), 16 R. R. R. 838, 39 Am. & Eng. R. Cas., N. S., 838; *Sluder v. St. Louis Transit Co.* (Mo.), 16 R. R. R. 293, 39 Am. & Eng. R. Cas., N. S., 293; *St. Louis & S. F. R. Co. v. McFall* (Ark.), 16 R. R. R. 243, 39 Am. & Eng. R. Cas., N. S., 243; foot-notes appended to *Chicago Union Traction Co. v. Leach* (Ill.), 16 R. R. R. 220, 39 Am. & Eng. R. Cas., N. S., 220.

†For the authorities in this series for, or against, the "last clear chance" doctrine, see foot-note appended to *McLean v. Omaha & C. B. Ry. & Bridge Co.* (Neb.), 16 R. R. R. 119, 39 Am. & Eng. R. Cas., N. S., 119; foot-notes appended to *Yeaton v. Boston & M. R. R.* (N. H.), 17 R. R. R. 160, 40 Am. & Eng. R. Cas., N. S., 160.

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Transferred from Superior Court; Peaslee, Judge.

Action by Henry Hanson against the Manchester Street Railway. A verdict was rendered in favor of plaintiff, and the case was transferred from the superior court. Verdict set aside.

On Labor Day, 1900, the plaintiff was injured in a collision between a car of the defendant corporation and a team driven by one Reagan, with whom the plaintiff had ridden from place to place for some time prior to the accident. The plaintiff's evidence tended to show that his injury resulted from the motorman's negligent failure to stop the car. The defendant's evidence tended to show that Reagan was intoxicated, and incapable of properly driving a horse; that the plaintiff got into the wagon while Reagan was in that condition, and continued to ride with him after he had an opportunity to quit his company; that at the time of the accident Reagan was guilty of a negligent act, which contributed to cause the accident, and which might reasonably have been expected of one in his condition; and that Reagan's drunken condition was known to the plaintiff during all the time they rode together. The jury were instructed in part as follows; the defendants excepting to the portions of the charge enclosed in brackets: "In this case the road's representative was the motorman. So far as this case is concerned, if he acted with reasonable care, the defendants are free from fault; and, if he was careless, the defendants were negligent. Considering, then, all the surrounding circumstances—the nature of the vehicle being operated, the means at hand for stopping it, the amount and nature of the travel at this place, all the general surroundings, and all the special circumstances you shall find to exist in this particular case—considering all these things, ought the motorman to have done something he failed to do, and so have avoided the accident? Of course, the general rule would be that the cars should go on their way without interruption; but this does not give the road the right to wantonly or carelessly run upon persons or teams upon the track. In a case like that, or in any emergency, they are required to refrain from an exercise of their ordinary rights to such an extent as due or ordinary care requires to avoid doing injury; that is, they are bound to act with an average degree of prudence, in view of the special facts, when the emergency arises. And the sole question as to the defendant's fault is whether the car should have been stopped after the motorman saw, or ought to have seen, the horse upon the track. * * * [The plaintiff was bound to use such a degree of care as a man of average prudence would have used, situated just as the plaintiff was. It is his conduct at the time the accident happened, and while it was imminent, which is decisive. His previous negligence (if he was negligent in riding with Reagan, or his misconduct in getting drunk (if he was in that condition), are not matters which will excuse the defendants, if at the time of the accident

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he was doing all that prudence required of a person in his situation. So you will inquire how the average man, riding along that street in that wagon driven by Reagan, would have acted at and just before the time of the collision. Was there anything which a fair degree of prudence called upon him to then do to escape the danger? If there was not, his previous fault (if there was such fault) is of no consequence. In law such prior negligence merely furnished an occasion for the defendants to negligently injure him, and their fault would be the legal cause of the accident.] It would be a negligent act for a man to drive a nervous horse with an insecure pair of reins; but if, while so doing, and controlling the horse the best he could with the insufficient harness, he was carelessly run upon by a person who could, by due care at the time, avoid the collision, the carelessness of the man who could at the time avoid the trouble is the cause of the accident, and he is legally responsible for its results. It is for you to say whether there is anything in the facts in this case to which this rule applies. [The fact (if it is a fact) that Reagan was drunk and was grossly careless is no defense. The question still would be: Could the plaintiff at the time of the accident have avoided the effect of Reagan's fault by the use of ordinary care?] To sum up, then: The plaintiff must have proved that at the time of the accident the defendants could, and he could not, prevent the collision by the exercise of ordinary care; and if Reagan was violating the speed law, and by such act caused the collision, it must appear that the plaintiff was not a party to that crime."

Burnham, Brown, Jones & Warren, for plaintiff.

Streeter & Hollis and *Taggart, Tuttle, Burroughs & Wyman*, for defendants.

PARSONS, C. J. The defendants' complaint is that the jury were not instructed as to the case made by their evidence. The evidence to which this complaint relates was that the plaintiff was knowingly and without necessity riding with a drunken driver, and that at the time of the accident the driver, Reagan, was guilty of a negligent act, which contributed to cause the injury, and which might reasonably have been expected of one in the condition in which Hanson knew Reagan to be. If the jury were not directed to pass upon this evidence, it must be taken, for the purposes of the case here, that this evidence was true, and would have established in the minds of the jury everything it tended to prove. That a jury might find that a man of ordinary prudence would not have continued to ride with a drunken, incompetent driver after he ascertained the fact, and that therefore such conduct was negligent, is not open to argument. They might, also, on the evidence, have found, not only that Hanson ought to have anticipated what was reasonably to be expected of one in Reagan's condition, but that in fact he did

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anticipate it. What this act was, or in what way it was connected with the injury, the case does not disclose. Whether it was or not a contributing cause of the injury upon the facts proved may be a question of law, but that question is not presented by the record, which states as a fact that the act did contribute to cause the injury. It is plain from the case that the distinction between negligence as the cause of the danger and negligence as the cause of the injury was present in the minds of counsel and court throughout the trial. The language of the case must have been used in its strict legal signification. In this sense Reagan's negligent act could not have been an act that "contributed to cause the injury," unless it was a proximate cause thereof; i. e., legally a part of the case—one without which there might have been no injury.

For his own protection Hanson was bound to exercise ordinary care in the selection of a driver, horse, harness, and carriage. *Plummer v. Ossipee*, 59 N. H. 55, 59; *Tucker v. Heniker*, 41 N. H. 317; *Clark v. Barrington*, 41 N. H. 44. For an injury to himself, in part from the negligence of another and in part from the insufficiency of the driver, horse, or carriage, due to his own want of care, he could not recover; not because the negligence of the driver or the defect in the horse, harness, or carriage is imputed to him, but because, under such circumstances, his own fault would be a proximate cause of the injury. The doctrine of imputed negligence, and of the identification of an innocent passenger with his driver, set up in *Thorogood v. Bryan*, 8 C. B. 115, had the effect of preventing a recovery by a faultless plaintiff, injured by the fault of another, in disregard of the fundamental law of negligence; that he whose wrongful act has injured one without fault must pay the damage so occasioned. The authority of the case is now almost universally denied in England and in this country. *Noyes v. Boscawen*, 64 N. H. 361, 370, 10 Atl. 690, 10 Am. St. Rep. 410; *Mills v. Armstrong*, 13 App. Cas. 1. But the refusal to follow *Thorogood v. Bryan* in depriving an innocent plaintiff of his action has nowhere been construed to give an action to a plaintiff whose fault caused the injury. If the suit had been against the city, or against the defendants, for an injury from a previous negligent obstruction of the street, the defendants' evidence would have constituted a defense. The plaintiff's negligence in riding with an unskillful driver, whose incompetency contributed to cause the injury, would have been its sole legal cause.

The law is not affected by the presence or the absence of the parties, or by the difficulty of applying it to a complicated state of facts. But the cases present different aspects, according to the facts in proof; and a statement of the law, correct as applied to one state of facts, may be erroneous in another. He who cannot at the time prevent an injury to himself by the fault of another present and acting is legally without fault, whether his inability to protect himself is due to his absence, prior negli-

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gence, or other cause. The fault of the one who can at the time, but who does not, prevent an injury, is its sole legal cause, however the dangerous situation was created (*Nashua Iron and Steel Co. v. Railroad*, 62 N. H. 159, 163, 164; *Parkinson v. Railway*, 71 N. H. 28, 51 Atl. 268; *Little v. Railroad*, 72 N. H. 61, 55 Atl. 190; s. c., 72 N. H. 502, 57 Atl. 920; *Yeaton v. Railroad*, 73 N. H. 285, 61 Atl. 522); or, as is sometimes said, although the plaintiff is in some degree negligent, he can nevertheless recover, if the defendant, by reasonable care, could have avoided the consequences of the plaintiff's negligence (*Grand Trunk Ry. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679, 36 L. Ed. 485; *Inland, etc., Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, 35 L. Ed. 270; *The Bernina*, 12 P. D. 58, 61, 89). The principle is the same, whatever the language used: The plaintiff can or cannot recover, accordingly as his negligence is or is not a proximate cause of his injury. In a highway or other case, in the absence of the defendants at the time, the negligence of the plaintiff in selecting an incompetent driver, whose incompetency contributed to the injury, would be, as matter of law, a proximate cause of the injury. If the defendants were present at the time of the accident, the plaintiff could no more recover for an injury to which his negligence in the selection of a driver, through the incompetency of the driver, contributed, than if they were absent. If, in spite of the negligence of the plaintiff in selecting a driver, the defendants by care could have prevented injury to the plaintiff in the position he occupied in the care of an incompetent driver, their failure to do so would be the sole cause of an injury which the plaintiff at the time could not prevent. Whatever the driver may have done would be immaterial, because care on the part of the defendants would have prevented the injury. Their negligence would have been its sole cause, to which neither the prior negligence of the plaintiff nor the recklessness of the driver would have contributed in a legal sense. Such was the theory of the instructions to the effect that the negligence of the plaintiff furnished merely the occasion of the injury, and that the reckless conduct of Reagan was no defense. These instructions, which were excepted to, amount to a ruling that, as matter of law, the act of Reagan, of which the defendants offered proof, was not a proximate cause of the injury. Such ruling may be correct, and generally would be so. It would plainly be incorrect if Reagan's act was in fact a proximate cause of the injury. The instructions given as to the defendants' care were correct.

If it were found that the defendants were in fault because the motorman did not stop the car as soon as he ought, under all the circumstances of the case, and thereby failed to avoid the injury, the instructions as to the plaintiff's fault were also correct, because in such case a negligent act of Reagan's which the defendants ought to have foreseen, or in spite of which the motorman ought to have prevented the injury, could not have

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been its proximate cause. But, while the instructions as a whole were technically correct, the plain tendency of those above recited (to which exception was taken), together with the omission to refer to Reagan's conduct on the question of the defendants' care, was to cause the jury to understand that the plaintiff's negligence in being with a drunken driver, and the latter's careless conduct at the time, were entirely immaterial, and were not to be considered by them at all in the case. They were told that the fact that Reagan was grossly careless was no defense. His acts at the time were competent for consideration on the question of the motorman's care, might be entirely decisive, and could in ordinary language be spoken of as a complete defense. Upon the whole case the tendency of the instructions to mislead the jury appears so plain that it is probable justice may not have been done, and that there ought to be a new trial.

Verdict set aside.

BINGHAM, J., did not sit. The others concurred.

HARBERT v. ATLANTA & C. AIR LINE RY. CO.

(Supreme Court of South Carolina, April 4, 1906.)

[53 S. E. Rep. 1001.]

Railroads—Accident at Crossing—Operation by Another Company.*—A railroad company cannot avoid its obligation to the public as a chartered road by turning over the operation of its road to another railroad company so as to escape liability for negligence at a railroad crossing.

Appeal—Appealable Orders.—Under Code Civ. Proc. 1902, § 11, subd. 2, providing for appeals from certain orders, an order refusing to strike out allegations in a pleading as irrelevant is not appealable.

Appeal from Common Pleas Circuit Court of Oconee County; Dantzler, Judge.

Action by James J. Harbert against the Atlanta & Charlotte Air Line Railway Company. From an order refusing to strike out allegations of answer, plaintiff appeals. Affirmed.

Stribling & Herndon, for appellant.

T. P. Cothran, for respondent.

WOODS, J. This is an action to recover damages for the alleged killing of James A. Harbert at a highway crossing over defendant's line of railway, near Ft. Madison, in Oconee county. The complaint alleged that the defendant, under a charter from the

*See foot-notes appended to *Chicago, etc., R. Co. v. Schdmitz* (Ill.), 18 R. R. R. 214, 41 Am. & Eng. R. Cas., N. S., 214; foot-notes appended to *Chicago & W. I. R. Co. v. Newell* (Ill.), 15 R. R. R. 706, 38 Am. & Eng. R. Cas., N. S., 706; foot-notes appended to *Chicago Term. Transfer R. Co. v. Vandenberg* (Ind.), 17 R. R. R. 740, 40 Am. & Eng. R. Cas., N. S., 740.

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state, was, on February 24, 1901, the owner of the line of railway on which the killing occurred; and that the railroad was at that time operated as a common carrier, and had been so operated for many years. It further alleged that on February 24, 1901, "the defendant, its servants and agents, having in their care, control, and management a certain locomotive engine and train of cars thereto attached, carelessly, negligently, recklessly, and willfully" ran the train of cars over and killed Harbert. The specific act of negligent and willful wrong charged against the defendant was the failure to give the statutory signals at the crossing. The defendant admitted the allegations of the complaint as to its ownership of the railroad under its charter, and as to the operation of the railroad as a common carrier. In the third paragraph of the answer the defendant, after admitting the charter, continues: "But denies that it was, at the time mentioned in said complaint, a common carrier of goods and passengers, or that it was operating or controlling any railroad cars, locomotives, or trains in the state of South Carolina." The fourth paragraph was as follows: "The defendant alleges that if the plaintiff's intestate was killed, that his death was caused by a train of the Southern Railway Company." The appeal is from an order of the circuit judge refusing the motion of the plaintiff to strike out the fourth paragraph entirely and the portion of the third paragraph above quoted as irrelevant and redundant.

1. The question involved in this appeal was decided in the case of *Smalley v. Ry. Co.* (S. C.) 53 S. E. 1000. The defendant could not avoid its obligations to the public as a chartered railroad company by turning over the operation of its road to the Southern Railway Company. As between defendant and the public, it is considered as still operating its railroad through its agent. The allegations of the answer, above quoted, therefore, constituted no defense, and should have been stricken out as irrelevant. The respondent submits, however, that an order refusing to strike out allegations of a pleading does not involve the merits, and is, therefore, not appealable.

2. Section 11, subd. 2, of the Code of Civil Procedure of 1902, provides for appeal from "an order affecting a substantial right made in an action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken, or discontinues the action, and when such order grants or refuses a new trial; or when such order strikes out an answer or any part thereof, or any pleading in any action * * *." The omission to provide for appeal from an order refusing to strike out is significant, and there was good reason for it. If the circuit court errs in striking out any material allegations of a good cause of action or good defense, it is impossible to remedy it in the course of the trial, because the evidence and the issues submitted to the jury cannot be extended beyond the issues made by the pleading, and on appeal from the final judgment this court

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could not say there was error of law in confining the evidence and charge to the pleadings. On the other hand, if the circuit court errs in refusing to strike out any pleading or portion of a pleading as irrelevant, the error of submitting an irrelevant issue to the jury may be corrected on appeal from the charge actually made, or from refusal of requests to charge. This view of the matter impairs no substantial right, and prevents multiplicity of useless appeals and the delay and inconvenience which would be incident thereto.

The judgment of this court is that the judgment of the circuit court be affirmed, on the ground that the order refusing the motion to strike out allegations of the answer as irrelevant and redundant is not appealable.

HUTCHINSON *et al.* v. MISSOURI PAC. RY. CO.

(Supreme Court of Missouri, March 30, 1906.)

[93 S. W. Rep. 931.]

Railroads—Persons on Track—Death—Negligence—Ringling Bell.*
—Where deceased heard and recognized the whistle of defendant's engine by which she was struck and killed, and saw the headlight, the negligence of the railroad's employees in failing to ring the bell as required by statute at the place of the accident was immaterial.

Same—Contributory Negligence.†—Deceased, knowing that a train was approaching and in close proximity to her, stepped on the track in front of the engine, and when it could have been but a few feet from her, and while pausing there to pick up something she had dropped, was immediately struck and killed. Held to sustain a finding that she was guilty of contributory negligence.

In Banc. Appeal from Circuit Court, St. Charles County; E. M. Hughes, Judge.

Action by R. L. Hutchinson and others against the Missouri Pacific Railway Company. From a judgment for defendant, plaintiffs appeal. Affirmed.

*For the authorities in this series on the question whether it is actionable negligence to fail to give crossing signals, where the person struck by the train or car knew of its approach in time to have avoided injury, see foot-notes appended to Hot Springs St. Ry. Co. v. Hildreth (Ark.), 18 R. R. R. 168, 41 Am. & Eng. R. Cas., N. S., 168; foot-note appended to Carpenter v. Chicago, etc., Ry. Co. (Iowa), 15 R. R. R. 466, 38 Am. & Eng. R. Cas., N. S., 466; Lambert v. Southern Pac. R. Co. (Cal.), 14 R. R. R. 575, 37 Am. & Eng. R. Cas., N. S., 575.

†For the authorities in this series on the question whether there may be a recovery for injuries sustained in an attempt to cross railroad tracks in front of an approaching train which was seen by the highway traveler to be approaching before he made the attempt, see foot-notes appended to Louisville & N. R. Co. v. Molloy's Adm'x (Ky.), 18 R. R. R. 714, 41 Am. & Eng. R. Cas., N. S., 714; Omaha St. Ry. Co. v. Mathiesen (Neb.), 18 R. R. R. 509, 41 Am. & Eng. R. Cas., N. S., 509; foot-notes appended to Wolf v. City & Suburban Ry. Co. (Ore.), 18 R. R. R. 210, 41 Am. & Eng. R. Cas., N. S., 210.

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A. R. Taylor, for appellants.

Martin L. Clardy and *Henry G. Herbel*, for respondent.

BRACE, C. J. The plaintiffs are minors suing by their next friend to recover the statutory damages of \$5,000 for the death of their mother, who was a widow, and whose death, it is alleged, was caused by the negligence of the defendant. The verdict and judgment below was for the defendant, and the plaintiffs appeal.

This is the second appeal in this case. On the first trial a demurrer to the plaintiffs' evidence was sustained in the trial court, and the plaintiffs appealed. On that appeal we held that the instruction in the nature of a demurrer to the evidence ought not to have been given, and for that error reversed the judgment of the circuit court and remanded the case for retrial in accordance with the law as declared in the opinion then handed down. 161 Mo. 246, 61 S. W. 635, 852, 84 Am. St. Rep. 710. The case was retried on the same pleadings and on substantially the same evidence as before. A full and accurate statement of the case will be found in the former opinion and need not be repeated here. On the retrial all the evidence offered for the plaintiffs was admitted and all the instructions asked for them given, and of those given for the defendant the only one excepted to is the following: "The court instructs the jury that the purpose of the law in requiring the bell of the engine to be sounded is to warn persons of the approach of the train; when they see or hear a train approaching, then the fact that they do not hear the engine bell, or the fact that such bell is not sounded, is immaterial. In this case, the jury are instructed that the evidence shows that Mrs. Hutchinson knew the train was approaching when she attempted to cross the tracks, and, therefore, the fact, if it be a fact, that the bell was not sounded cannot be considered by the jury." In the first paragraph of the former opinion it was expressly ruled that "the fact, if it be a fact, that the engine bell was not rung as the statute requires, is immaterial under the other facts of the case. The object of ringing the bell is to give notice of the approach of the train; but in this instance that was unnecessary, because Mrs. Hutchinson heard and recognized the whistle and saw the headlight. She knew the train was coming, and required no further warning. The failure to ring the bell, though an act of negligence, could not have contributed to the catastrophe." The instruction was not only in strict conformity to the ruling on the former appeal in this case but to the rulings in many other like cases. *Moody v. Pacific R. Co.*, 68 Mo. 470; *Rine v. C. & A. R. Co.*, 88 Mo. 392; *McManamee v. Mo. Pac. Ry. Co.*, 135 Mo. 440, 37 S. W. 119. There was no error in giving this instruction, and, as this is the only error assigned in the trial of the cause, it would seem that in finding there was no error in this respect, in the ordinary course of things the end

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of the case would have been reached and nothing would remain to be done except to affirm the judgment.

Nevertheless, it is stoutly insisted by counsel that the judgment ought to be reversed and a judgment for the plaintiff directed, notwithstanding the verdict, for the reason that the uncontradicted evidence showed gross negligence on the part of the defendant and there was not a scintilla of evidence tending to prove contributory negligence upon the part of the deceased. In view of the history of this case, this is a remarkable proposition. The negligence of the defendant through the whole of that history has been practically undisputed. The sole bone of contention has been the contributory negligence of the deceased. It was so palpable and overwhelming to the mind of the learned judge who first tried the case that he sustained a demurrer to the evidence. It was so manifest to the mind of three of our associates when that ruling came before us on the first appeal that they were of the opinion that the trial judge correctly sustained the demurrer. Nine of the 12 jurors who tried the case below found the fact so to be and the judge before whom it was last sanctioned their verdict. And yet according to this contention there was not a scintilla of evidence upon which these numerous minds of different experiences and varied accomplishments based their conclusion. The proposition is, however, still more remarkable in face of the undisputed facts; that this unfortunate lady, knowing that the train was approaching and in close proximity to her, stepped upon the track in front of the engine and when it could have been but a few feet distant from her, and, while pausing there for a moment to pick up something that she had dropped, was immediately struck and killed. To say under such circumstances there was not a scintilla of evidence that she was guilty of contributory negligence is preposterous. In the light of these facts, and in view of the history of the case a review of the specious reasoning that attempts to sustain such a conclusion is unnecessary.

The judgment of the circuit court is affirmed. All concur.

MCCARTHY v. CONSOLIDATED RY. CO.

(Supreme Court of Errors of Connecticut, May 3, 1906.)

[63 Atl. Rep. 725.]

Street Railroads—Rights of Street Car and Traveler.*—The rights of a street car and a traveler are equal, and the right of each must be exercised with due regard to that attaching to the other, and so as not to interfere with it unreasonably.

*For the authorities in this series on subject of the mutual rights and duties of street railways and other users of streets, see foot-notes appended to *Ablard v. Detroit United Ry.* (Mich.), 18 R. R. R. 722, 41 Am. & Eng. R. Cas., N. S., 722; foot-notes appended to *Hot Springs St. Ry. Co. v. Hildreth* (Ark.), 18 R. R. R. 168, 41

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Same—Care of Traveler.†—The driver of an ordinary vehicle is justified in proceeding to cross a street railway track in the face of an approaching car only when he has reasonable ground for believing that he can pass in safety where both he and those in charge of the car act with reasonable regard to the rights of each other.

Trial—Trial by Court—Findings of Fact.—A finding of the trial court, in an action against a street railway company for the death of a traveler in a collision with a car, that each party to the collision was in fault and that the fault of the decedent contributed to the injury, is a conclusion of fact, and must stand, unless inconsistent with other facts found.

Same.—In an action against a street railway company for the death of a traveler in a collision with a car, the court found that decedent was struck by a car while attempting to cross the track; that the view of one traveling toward the track was almost shut off until he came within 50 feet of the track, and partially obscured until he came within 30 feet; that the accident occurred on a warm day, when there had been no frost for 48 hours, and the tracks were in their usual condition; that the motorman had never run a car on the track before the day of the accident; that he testified that by applying the brake and on its failure reversing the power he could stop a car within 10 feet, if the rails were in good condition; that the car was running on a slight downgrade at the rate of about 20 miles an hour; that the motorman at a distance of about 250 feet from the place of the accident saw the head of the horse approaching; that he sounded his gong and shut off the power, but made no other effort to slacken the speed. Held that the findings were not inconsistent with a finding that each party to the collision was in fault, and that the fault of the decedent contributed to the injury.

Evidence—Best Evidence.—Where, in an action against a street railway company for the death of a traveler in a collision with a car, a copy of a report of the accident, made to the company, was by stipulation of the parties given the position of the original report, the copy was the best evidence of the contents of the report, and the motorman who made it could not be asked whether it contained any statement that the rails were slippery, so that he could not bring the car to a stop before the collision.

Appeal—Correction of Findings—Application—Objections.—Where the objections to an application to rectify an appeal by making changes in the finding are apparent on the face of the application, a motion to dismiss the application is improper, and the place to urge

Am. & Eng. R. Cas., N. S., 168; *Marden v. Portsmouth, etc., St. Ry. (Me.)*, 17 R. R. R. 821, 40 Am. & Eng. R. Cas., N. S., 821; foot-notes appended to *O'Brien v. Blue Hill St. Ry. Co. (Mass.)*, 14 R. R. R. 806, 37 Am. & Eng. R. Cas., N. S., 806; *Dungan v. Wilmington City Ry. Co. (Del.)*, 14 R. R. R. 746, 37 Am. & Eng. R. Cas., N. S., 746; *Greene v. Louisville Ry. Co. (Ky.)*, 14 R. R. R. 589, 37 Am. & Eng. R. Cas., N. S., 589; *Birmingham Ry. L. & P. Co. v. Oldham (Ala.)*, 14 R. R. R. 165, 37 Am. & Eng. R. Cas., N. S., 165; *Rhymes v. Jackson El. Ry., etc., Co. (Miss.)*, 14 R. R. R. 7, 37 Am. & Eng. R. Cas., N. S., 7; *Lightfoot v. Winnebago Traction Co. (Wis.)*, 14 R. R. R. 1, 37 Am. & Eng. R. Cas., N. S., 1.

†For the authorities in this series on the subject of the care required of those driving other vehicles on streets upon which street cars are operated, see foot-notes appended to *Ablard v. Detroit United Ry. (Mich.)*, 18 R. R. R. 722, 41 Am. & Eng. R. Cas., N. S., 722; foot-notes appended to *Marden v. Portsmouth, etc., St. Ry. (Me.)*, 17 R. R. R. 821, 40 Am. & Eng. R. Cas., N. S., 821; foot-note appended to *Riley v. Shreveport Traction Co. (La.)*, 16 R. R. R. 785, 39 Am. & Eng. R. Cas., N. S., 785; *Wood v. Boston Elevated Ry. Co. (Mass.)*, 16 R. R. R. 475, 39 Am. & Eng. R. Cas., N. S., 475.

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the objections is in such brief as may be filed in opposition to granting it.

Same.—The court, on appeal, will entertain the application of appellant to rectify the appeal by making changes in the findings with respect to matters to which he has not otherwise presented exceptions.

Same.—As an application to rectify an appeal by making changes in the finding is in its nature a summary proceeding, the court on appeal will consider a deposition taken in support of the application, though not finished until the day before the opening of the term.

Street Railroads—Injury to Traveler in Collision—Findings—Evidence—Sufficiency.—A finding, in an action against a street railway company for the death of a traveler in a collision with a car, that the decedent saw and heard the car before he stopped his team before entering on the track, was properly inferred from proof that decedent had the opportunity to see and hear the car.

Same.—A finding, in an action against a street railway company for the death of a traveler in a collision with a car, that decedent could have remained where he stopped his horse, from 6 to 10 feet from the track, on the approach of the car, is properly drawn from a finding that decedent on approaching the track drove his horse at a walk, which gait was maintained until he saw and heard the car when he stopped the horse from 6 to 10 feet from the track.

Appeal from Superior Court, New Haven County; Ralph Wheeler, Judge.

Action by Frederick M. McCarthy, administrator of Frank Smokas, against the Consolidated Railway Company. From a judgment granting insufficient relief, plaintiff appeals. Affirmed.

The finding showed these facts: The intestate was driving an empty farm wagon across the defendant's track on Quinnipiac avenue, in a thinly settled part of the town of New Haven, near Montowese, when the wagon was struck by an electric car, and his death was the result. The accident took place in broad daylight at the intersection of Smith and Quinnipiac avenues. The car was running on Quinnipiac avenue toward Smith avenue on a slight downgrade, at the rate of about 20 miles an hour, when, at a distance of about 250 feet from it, the motorman saw the head of the horse which was drawing the wagon, approaching from Smith avenue. He thereupon sounded his gong and shut off the electric power, but made no other effort to slacken speed. The horse was approaching at a walk, which gait was maintained, until the intestate, seeing and hearing the car, pulled up, stopping the team with the horse's head from 6 to 10 feet from the nearest rail. There was nothing to prevent or interfere with his remaining with his team in that place till the car had passed by. The motorman saw him stop, supposed that he would remain where he was, and therefore allowed his car to proceed without applying the brake; but, within a second or two after stopping, the intestate struck the horse quickly with the reins and urged it forward upon the track. The car was then from 75 to 100 feet away and in full view. The motorman immediately applied his air brake "at emergency," but the wheels

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slid on the rails. He then threw it off and applied the "power at reverse," before the collision occurred. At the time of the collision the speed of the car had thus been reduced to about 12 miles an hour. It was brought to a stop about 146 feet from the point of collision. The car had a good sand box; but in the few seconds that elapsed between the starting forward of the horse and the collision the motorman had no reasonable opportunity to use the sand, and did not try to use it.

The ultimate conclusions reached by the court, on which the judgment was founded, were these: (1) The speed of the defendant's car was dangerous under the circumstance of the situation. Though the plaintiff's intestate saw the car, and stopped his horse before he started to cross the track, the motorman was negligent in not reducing the speed of his car at once, as rapidly as possible. (2) When the motorman saw that the plaintiff's intestate intended to cross the tracks, he appears to have done all that could reasonably have been expected of him in the few seconds in which he had to act. (3) The plaintiff's intestate was guilty of contributory negligence.

Charles S. Hamilton and Denis F. Walsh, for appellant.
Harry G. Day, for appellee.

BALDWIN, J. (after stating the facts). At highway crossings, a street car has no paramount right as against any other vehicle approaching on the cross street. The right attaching to each is equal, and must be exercised with due regard to that attaching to the other, and so as not to interfere with or abridge it unreasonably. It is not necessarily the duty of the driver of an approaching team to wait until the street car has passed, nor is it necessarily his right to push on and cut off its advance. Each party must act reasonably under all the attending circumstances. The driver of an ordinary vehicle can, under ordinary circumstances, be justified in proceeding, at a highway crossing, to go over a street railway in the face of an approaching car, when, and only when, he has reasonable ground for believing that he can pass in safety if both he and those in charge of the care act with reasonable regard to the rights of each other. The duty to slow up or stop, if necessary to prevent a collision, rests equally on each party.

In practical effect these doctrines give any railroad car approaching a highway crossing, what amounts to a right of precedence. This follows from the rule respecting contributory negligence. No man has the right to calculate close chances as to his ability to reach the track before the car, and throw the risk of injury on the other party. As to whether the chances were close, however, and the railroad company were not the one really in fault, or whether the party injured did not push forward under circumstances of emergency which left him no time for calculation, will ordinarily be a question for the jury, or, in case of a default, for the court in assessing damages. *Lawler v.*

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Hartford Street Ry. Co., 72 Conn. 74, 82, 43 Atl. 545. The trial court has found, in the present case, that each party to the collision was in fault, and that the fault of the intestate contributed to the injury. These conclusions were conclusions of fact, and must stand unless they are inconsistent with other primary or subordinate facts which have been specially set forth. Rohloff v. Fair Haven & W. R. Co., 76 Conn. 689, 693, 58 Atl. 5.

The facts of that nature on which the plaintiff relies, aside from those already mentioned, are that the body of the wagon was low, with a turning space of only about eight inches between it and the inner rim of the forward wheel; that Smith avenue sloped slightly downwards, at its intersection with Quinnipiac avenue; that the view, of one traveling over Smith avenue, toward Quinnipiac, of the latter was almost shut off by obstructions until he came within 50 feet of the railway tracks, and partially obscured until he came within 30 feet of them; that the accident occurred on a clear, warm day in October, when there had been no frost for 48 hours, and the tracks were in their usual condition; that the motorman had never run a car on this piece of the railway before that day; that he testified on cross-examination that by applying the brake, and on its failure reversing the power, he could stop such a car within 10 feet, if the rails were in good condition; and that the conductor was not called as a witness by the defendant, nor any excuse shown for his absence. The facts thus detailed were proper subjects of consideration by the trial judge. They were considered by him, and there is nothing in any or all of them not fully consistent with the judgment rendered.

The motorman testified for the defendant that he could not bring the car to a stop more quickly because the rails were slippery on account of leaves which lay upon them, and frost. On cross-examination he was shown a copy of the written report of the accident which he made to the company (and which it had been stipulated might be used in place of the original), and asked if it contained any statement that the rails were slippery, or anything as to leaves or frost. The question was properly excluded. The paper occupied, by stipulation, the position of the original report, and was therefore the best evidence of the contents of that document. An application was filed in this court to rectify the appeal, by making certain changes in the finding, and was met by a written motion by the appellee for its dismissal. Such a motion was unnecessary and improper. All the objections which were brought forward by it were apparent on the face of the application, and the place to state and urge them was in such brief as might be filed in opposition to granting it.

One of these objections is that an application to rectify an appeal, under Gen. St. 1902, § 800, can only be made in cases where no remedy is afforded by Gen. St. 1902, §§ 795-797. The matters as to which the appellant has asked us to rectify the appeal he has not otherwise presented upon exceptions, and we

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have therefore entertained his application. *Adams v. Turner*, 73 Conn. 47, 46 Atl. 247, note; *McCusker v. Spier*, 72 Conn. 628, 630, 45 Atl. 1011; *State v. Hunter*, 73 Conn. 435, 445, 47 Atl. 665. A deposition taken in its support was not finished until the day before the opening of the term, and the appellee objected to its reception on the ground that it came too late. An application of this character, with all its incidents, is in its nature so summary a proceeding that we have concluded to receive and consider the deposition.

The appellant asks us to strike out of the finding the statement that the intestate saw and heard the car before he stopped his team, because there was no direct evidence of it. It was, however, a fair matter of inference from his opportunity to see and hear it. Another statement which it was alleged was made upon no evidence is that there was nothing to prevent his remaining where he stopped it. This also was a conclusion which could properly be drawn from the attending circumstances.

Nothing else in the application merits discussion, and it is denied.

There is no error. The other Judges concurred.

MORRISON *v.* SAN PEDRO, L. A. & S. L. R. Co.

[Supreme Court of Utah, Feb. 12, 1907.]

[88 Pac. Rep. 998.]

Master and Servant—Injuries to Servant—Railroads—What Law Governs*—Where a servant was injured in the operation of a railroad in the state of Nevada, whether he was barred from recovery on the ground that he was injured by the negligence of a fellow servant depended on the law of that state.

Same—Fellow Servants—Definition.†—In the absence of some statute defining fellow servant, the test to be applied is whether the negligent act, which caused the injury, was a breach of a positive duty owing by the master to his servant, in which case the person performing the act is a vice principal, and not a fellow servant.

*See foot-notes appended to *Kansas City Southern Ry. Co. v. Ingram* (Ark.), 21 R. R. R. 570, 44 Am. & Eng. R. Cas., N. S., 570.

†See *Merrill v. Oregon Short Line R. Co.* (Utah), 19 R. R. R. 221, 42 Am. & Eng. R. Cas., N. S., 221; *Alabama Great So. R. Co. v. Vail* (Ala.), 17 R. R. R. 718, 40 Am. & Eng. R. Cas., N. S., 718; foot-notes appended to *Pennsylvania Co. v. Fishack* (C. C. A.), 9 R. R. R. 85, 32 Am. & Eng. R. Cas., N. S., 85.

For the authorities in this series showing who are, and are not, vice-principals, or superior servants, the risks from whose negligence other employees do not assume under the fellow servant rule, see foot-notes appended to *Mollhoff v. Chicago, etc., R. Co.* (Okla.), 19 R. R. R. 709, 42 Am. & Eng. R. Cas., N. S., 709; *Jemming v. Great Northern Ry. Co.* (Minn.), 19 R. R. R. 697, 42 Am. & Eng. R. Cas., N. S., 697; foot-notes appended to *Shuster v. Philadelphia, etc., R. Co.* (Del.), 19 R. R. R. 6, 42 Am. & Eng. R. Cas., N. S., 6; foot-notes appended to *Howard v. Chesapeake & O. Ry. Co.* (Ky.), 18 R. R. R. 842, 41 Am. & Eng. R. Cas., N. S., 842.

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Same—Rules—Promulgation—Enforcement.†—A railroad company operating a construction line owes an absolute duty to its servants, engaged in operating work trains over the same, not only to promulgate rules and issue orders for the running of such trains, but also to use reasonable care to see that the same are enforced.

Same—Evidence.—Defendant railroad company was engaged in constructing a railroad on which trains west of C. were operated under bulletin orders issued by defendant's trainmaster. An order was issued that all east-bound work trains should have right of way over west-bound trains between 12 o'clock noon and 12 o'clock midnight, and vice versa between 12 o'clock midnight and 12 o'clock noon. On the day of the accident plaintiff, as engineer, was running an extra east-bound train about 60 miles west of C., and at 1 o'clock p. m. his train, having the right of way under such orders, was run into by a west-bound train in charge of the trainmaster as foreman in charge of a crew of laborers. The latter train was run at a high rate of speed on a crooked track through a rough and mountainous country, and no flagman was put out or any steps taken to protect plaintiff's east-bound train. Held, that the negligence of the trainmaster in permitting his train to be run in violation of the bulletin was negligence in his capacity as vice principal, and not as plaintiff's fellow servant, for which the railroad company was responsible.

Appeal from District Court, Third District; M. L. Ritchie, Judge.

Action by D. R. Morrison against the San Pedro, Los Angeles & Salt Lake Railroad Company and others. From a judgment for plaintiff against the named defendant, it appeals. Affirmed.

Respondent sued to recover damages for injuries received in and about the face and head, destroying the sight of one eye and greatly impairing the sight of the other, and otherwise injuring and disfiguring him about the face, and otherwise bruising and injuring him, which said injuries he believes to be permanent and lasting, and have and will in the future bar and prevent him from following his usual occupation, that of engineer, and will render him unable to earn a livelihood for himself as theretofore, and will in the future cause him to suffer great pain and mental anguish; all of which he alleges to have been due to the negligence of the defendants while he was in their employ in the capacity of a locomotive engineer. The defendant the San Pedro Construction Company was never served with process in the action, and no appearance was ever made for it. A verdict of no cause of action was returned in favor of the defendant the Empire Construction Company under the instruction of the trial court, and a verdict and judgment rendered against the appellant. San Pedro, Los Angeles & Salt Lake Railroad Company,

†See foot-notes appended to *Merrill v. Oregon Short Line R. Co.* (Utah), 19 R. R. R. 221, 42 Am. & Eng. R. Cas., N. S., 221; foot-notes appended to *Shuster v. Philadelphia, etc., R. Co.* (Del.), 19 R. R. R. 6, 42 Am. & Eng. R. Cas., N. S., 6.

For the authorities in this series on the question whether a railroad company is responsible for injuries to its servants resulting from the violation of rules made for the protection of its employees, see foot-notes appended to *Sanders v. Central of Georgia Ry. Co.* (Ga.), 18 R. R. R. 7, 41 Am. & Eng. R. Cas., N. S., 7.

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for damages in the sum of \$7,000; and this appeal is prosecuted to reverse the said verdict and judgment.

The record discloses substantially the following facts: The appellant was engaged in constructing a railroad from Caliente west in the state of Nevada. Between Caliente and Moapa, a distance of about 85 miles, there was a single track, with here and there turnouts and switches. The railroad was in process of construction between Caliente and Moapa, and west of Moapa. It was constantly necessary to run trains between Caliente and the west end of the road, as far as the work had progressed. The country through which the road was building was rough and mountainous, and the right of way lay through many deep canyons, and the curves were long and numerous. There were no regular hours for the movements of trains, with the exceptions of two regular trains each way every day. The trains being used for the transportation of workmen and material, known as "work train extras," moved east and west as the exigencies of the work required. About the 1st of March, 1904, the respondent went to work for appellant at Caliente, in the state of Nevada, in the capacity of locomotive engineer, and ran what was called a "work train" between various points west of Caliente, up to and until the 17th day of August, 1904, the date when he received the injuries complained of. From Caliente west there was no system of telegraph or telephone, so that the trains engaged on the work of construction did not run with any regularity; and the only method of operating the trains was by bulletin orders, which were written out and delivered to the engineers and conductors of the various trains by an employee known as and who was a general foreman, or trainmaster. At the time when respondent first went to work at Caliente, and beyond, up till between the 1st and 15th of June, 1904, one McDermott issued these orders. Thereafter for about a month, John Conway issued and signed the bulletin orders; but after July 15, 1904, till the time of the collision, when respondent was injured, a man by the name of William Branen (W. F. Branen) issued all the bulletin orders regulating the running of work trains extra. Respecting these bulletin orders respondent testified that he remembered the first one issued by Branen was the annulment of all orders issued up to that time; and afterwards he received other bulletins, among them the following one: "Bulletin Order No. 3. Caliente, Nevada, July 18, 1904. All Concerned: Bulletin No. 3. In effect July 21. from Caliente to end of track. All previous bulletins are annulled. All work trains extra east-bound will have right of track over all west-bound work trains extra between 12 K. noon and 12 K. midnight. All work trains extra west-bound will have right of track over all work trains extra east-bound between 12 midnight and 12 o'clock noon. W. F. Branen, Trainmaster." On August 17, 1904, the respondent was running what was known as "work train extra 501," and left siding 60, which

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was 60 miles west of Caliente, at 1 o'clock p. m., for the purpose of taking an injured man, one of the laborers, to Caliente to the doctor. On the same day another train, known as "work train extra 636," had gone from Caliente west, a distance of 20 miles, where was camped a gang of laborers, which it picked up, and where the train was loaded with rock for use in construction work. The crew of this latter train consisted of the engineer, a fireman, and a conductor, and William Branen. After loading the train with rock, it went back east towards Caliente, and stopped at a point about $2\frac{1}{2}$ miles west of Caliente. Branen directed the train crew to place the various cars. In the afternoon work train extra 636, bearing Branen and the other employees mentioned, went about 14 miles east of camp to bridge 7. It remained there about an hour; then went farther east to bridge 4. It remained there, standing on the main line, perhaps an hour and a half. When the train started west, towards camp, the entire crew got on. Branen got on at the east end of the train, but immediately walked to the west end, and there took a position on the platform of the caboose, where he remained while the train ran from bridge 4, from which place it started, until it arrived at bridge 10, where it collided with the train being run by the respondent towards Caliente. According to respondent's witnesses the train on which Branen was riding was running at the time of the collision 30 miles an hour; and according to appellant's witnesses it was running not more than 12 miles an hour.

These are substantially the facts as gleaned from the transcript and abstract, and, with the exception of the testimony of the witnesses as to the speed of the train (work train extra 636) at the time of the collision, there is no apparent conflict.

C. C. Whittemore, J. U. N. Whitecotton, and Pennel Cherrington, for appellant.

Powers & Marioneaux, for respondent.

ERICKSON, District Judge, after stating the facts, delivered the opinion of the court.

Counsel for appellant have assigned a number of alleged errors; but in their brief, and also upon the oral argument of the case before this court, they rely chiefly for a reversal of the judgment upon an alleged error of the trial court, wherein said court instructed the jury that all the members of the train crew of 501, the train on which respondent was riding and the members of the train crew on the colliding train (636), with the single exception of William Branen, were fellow servants of respondent, for whose negligence appellant was not liable in the action. The instruction complained of is as follows: "You are instructed that by the undisputed evidence in this case the accident in which the plaintiff was injured occurred in the state of Nevada, and the plaintiff's right to recover in this action is to be determined by the law of that state; and the court further

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charges you that by the law of that state the plaintiff was a fellow servant of Conductor Heston, Fireman Hickey, and Brakemen Bond and Colvin, the members of the train crew of the train which the plaintiff was running at the time the collision occurred, and was also a fellow servant of Engineer Derham, Conductor Tooly, Fireman Obernalte, and Brakemen Webb and Sibley of the train which collided with the train run by plaintiff. If, therefore, you find from the evidence in this case that the plaintiff was injured, if at all, as the direct result of the negligence of one or of all of the fellow servants above named, without any negligence as hereinbefore defined on the part of the defendant, then the defendant is not liable in this action, and that it is your duty to find a verdict in favor of the defendant." The trial court, in instruction No. 10, given to the jury, said: "You are further instructed that, if you believe from the evidence that the defendant had committed to William Branen the duty of making and promulgating rules for the movements of its trains, then it was the duty of said William Branen to exercise a degree of care and diligence in enforcing any orders or rules he may have given proportionate to the danger which might result to any employee of the defendant from a failure to enforce such obedience; and if you believe from the evidence that he knew, prior to the accident and in time to avert the same by the exercise of his authority, that bulletin order No. 3 was being violated, or in the exercise of ordinary care on his part could have known in time to avert the accident that bulletin order No. 3 was being violated, and that such violation caused the collision in question, then, if you further believe that Morrison was injured while exercising ordinary care for his own safety, your verdict must be for the plaintiff." This clearly submitted to the jury the question as to the position occupied by Branen at the time of the collision of the two trains, whether he was a fellow servant of respondent or a vice principal of appellant. And evidently counsel for appellant regard this as the decisive question in the case, for they say in their brief: "As we view the case, the errors alleged resolve themselves into the one question, viz., was Branen, at the time of the accident complained of, a fellow servant of the plaintiff?"

Counsel for respondent take the position "that the question involved cannot be resolved by determining simply whether or no Branen was a fellow servant of plaintiff at the time of the accident" and they make the contention that the law is settled beyond all controversy: "(1) There are certain primary duties devolving on the master, which he cannot delegate to any employee, so as to relieve himself from responsibility for negligence in their performance. (2) That one of those duties is to make and enforce rules and regulations which will promote the safety of his employees in all cases where the business cannot be conducted without such rules. [Here citing *Johnson v. Union Pacific (Utah)* 76 Pac. 1089, 67 L. R. A. 506; *Pool v.*

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Southern Pacific, 20 Utah, 210, 58 Pac. 326; *Morrill v. Oregon Short Line* (Utah) 81 Pac. 85.] (3) That the circumstances that the person to whom the master has delegated the performance of his positive duty may, in respect to the performance of duties, be a fellow servant is of no consequence in a suit by an employee for an injury arising out of the neglect of such person to perform the positive duty of the master. [Here citing cases last above mentioned; also *Chicago Hair & Bristle Co. v. Mueller* (Ill.) 68 N. E. 51, and authorities there cited.]” The injury complained of was received in the state of Nevada, and it was admitted at the trial that the common law relating to fellow servants was in force, and no statute on the subject had been enacted in that state at the time of the receiving of the injury by respondent, so that the question of liability must be determined under the rules of the common law. Mr. Justice Peckman, in a very able opinion in the case of *Northern Pac. R. Co. v. Peterson*, 162 U. S. 346, 16 Sup. Ct. 843, 40 L. Ed. 994, says: “The general rule is that those entering into the service of a common master become thereby engaged in a common service and are fellow servants, and prima facie the common master is not liable for negligence of one of his servants which has resulted in an injury to a fellow servant. There are, however, some duties which a master owes, as such, to a servant entering his employment. He owes the duty to provide such servant with a reasonably safe place to work in, having reference to the character of the employment in which the servant is engaged. * * * And it has been held in many of the states that the master owes the further duty of adopting and promulgating safe and proper rules for the conduct of his business, including the government of the machinery and the running of trains on a railroad track. If, instead of personally performing these obligations, the master engages another to do them for him, he is liable for the neglect of that other, which, in such case, is not the neglect of a fellow servant, no matter what his position as to other matters, but is the neglect of the master to do those things which it is the duty of the master to perform as such.” Mr. Justice Brewer, in the course of his opinion delivered in the case of *Baltimore & O. R. v. Baugh*, 149 U. S. 387, 13 Sup. Ct. 921, 37 L. Ed. 772, makes this comment: “Therefore it will be seen that the question turns rather on the character of the act than on the relation of the employees to each other. If the act is one done in the discharge of some positive duty of the master to the servant, then the negligence in the act is the negligence of the master; but, if it be not one in the discharge of such positive duty, then there should be some personal wrong on the part of the employer before he is held liable.” Circuit Judge Taft, in the case of *Baltimore & O. R. Co. v. Camp*, 65 Fed. 959, 13 C. C. A. 239, uses this language: “More than this, we do not doubt that a train dispatcher is a representative of the company, within the rule of

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the common law, as expounded by the Supreme Court of the United States in the case of *Railroad Co. v. Baugh*, 149 U. S. 369, 13 Sup. Ct. 914, 37 L. Ed. 772. He represents the company for two reasons: First, because he is pro tempore in supreme control of a distinct department of the company for his division; and, second, because the work which he is called upon to do is in the discharge of a positive duty owed by the company to its employees. Again, the railway company is bound to provide general rules and general time-tables for the reasonably safe operation of its railway system, and also rules applicable to all emergencies likely to arise. It is inevitable that at times, and in sudden exigencies, the general time-tables must be set aside. It then becomes the duty of the company to construct a temporary time-table with such care and skill that it may be reasonably adapted to secure the operation of all the trains on the road without accident or injury to passenger or employee. The person who devises this temporary time-table for the company and issues telegraphic orders to carry it out is the train dispatcher. He acts, it is true, under certain rules; but he is intrusted with a wide discretion and absolute control. That he is the representative of the company, and not the fellow servant of those required to obey his orders, is held by many courts." 12 A. & E. Enc. L. (2d Ed.) 967, notes 4, 5, and notes 1-4, p. 968; *Hankins v. Railroad Co.*, 142 N. Y. 416, 37 N. E. 466, 25 L. R. A. 396, 40 Am. St. Rep. 616; *Dana v. Railroad Co.*, 92 N. Y. 639; *Darrigan v. Railroad Co.*, 52 Conn. 285, 52 Am. Rep. 590; *Lewis v. Seifert*, 116 Pa. 628, 11 Atl. 514, 2 Am. St. Rep. 631; *Hunn v. Railroad Co.*, 78 Mich. 513, 44 N. W. 502, 7 L. R. A. 500; *Railroad Co. v. Barry*, 58 Ark. 198, 23 S. W. 1097; *Railroad Co. v. McLellan*, 84 Ill. 100; *Smith v. Railroad Co.*, 92 Mo. 359, 4 S. W. 129, 1 Am. St. Rep. 729; *Washburn v. Railroad Co.*, 3 Head. (Tenn.) 638, 75 Am. Dec. 784; *Railroad Co. v. Arispe*, 5 Tex. Civ. App. 511, 23 S. W. 928, 24 S. W. 33. In the *Hankins* Case, the court held that where a servant is injured by the negligent performance of an act or duty which the master, as such, is required to perform, the latter is liable, although the negligence was that of another servant to whom the performance of the act or duty was intrusted, and this without regard to the rank or title of the person guilty of the negligence. "The master is not relieved from liability in such case by the fact that he has promulgated rules or regulations for the proper performance of the act or duty by his agent, which were disregarded by the latter. A train dispatcher, in ordering the movements of railroad trains, performs a duty resting upon the railroad company; and, as to its employees, his acts are those of the company."

A train dispatcher is not relieved, nor does he relieve the company, by promulgation of an order. He must at all times know and guard against possible changes. The evidence showed

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that Branen held the position of trainmaster for the appellant company; that he gave orders to respondent and other employees, and on the day in question he was acting as foreman and had charge and control of a gang of laborers employed on a work train known as "extra 636," in construction work; and that he held a position of superiority to respondent and other employees of appellant. The mere fact that Branen engaged in some labor as a common workman did not, as a matter of law, make him any the less a vice principal. *Pittsburg Bridge Co. v. Walker*, 170 Ill. 550, 48 N. E. 915; *Chicago & Alton R. Co. v. May*, 108 Ill. 288. Associate Justice McKenna of the United States Supreme Court, in the case of *Santa Fe Pac. R. Co. v. Holmes* (decided May 21, 1906) 26 Sup. Ct. 676, 50 L. Ed. 1904, holds that "the duty of the master to furnish safe places for employees to work in and safe appliances to work with is a continuing one, to be exercised wherever circumstances require it. While the duty of the master—in this case a railroad company—may be, and frequently is, discharged by one exercise, it may recur at any moment in keeping trains in safe relation." The rule consonant with the analogies of the law, and which is supported by the vast preponderance of the common-law authority, and which furnishes the safest guide in the majority of cases, is that "the master's liability to one servant for the negligence of another in no wise depends upon comparative rank of the negligent servant. True, the master may be liable for negligence of a superior servant; but it is not because of his superior rank. It is because he is charged with the performance of one of the master's personal duties. If a servant is charged with the performance of one of the master's duties, then the master must answer for his negligence in the discharge of that duty; and it is immaterial whether the servant who is charged with, and fails in the performance of, the master's personal obligation, ranks above or below the servant who is injured. The test, then, which determines the master's liability, is the nature of the act in reference to which the negligence occurred. If the servant whose negligence caused the injury was at the time performing one of the master's duties to his servants, the master is liable. If, on the other hand, he was not performing a duty which the law imposes upon the master, the master is not liable." 12 A. & E. Ency. Law (2d Ed.) 933; also note 2, citing English and United States cases, both federal and state. As the facts appear in the record, the master had invested Branen with full authority over Morrison, an engineer, and all other engineers, as well as all conductors on the work trains west of Caliente, and to make rules and give orders for the movement of the trains upon which they were employed. He exercised this authority in issuing bulletin order No. 3, prescribing the time when trains should have the right of way over the division of the road then being constructed by appellant. This duty, imposed upon and delegated to him, was in the

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nature of a positive and primary duty, and of such a character that the master could not be relieved from responsibility for the negligent performance of such duty by an employee.

But counsel for appellant contend "that there is no evidence in the case showing, or tending to show, that William F. Branen, the person who had issued bulletin order No. 3, had any authority whatever to enforce its observance, or to enforce the observance of any rule." To this contention counsel for respondent very pertinently reply that "it is without merit and begs the question." If anything was intended by the language just quoted from appellant's brief, it is intended to convey the impression that Branen had no authority to give any order to the conductor and engineer of work train extra 636, the one upon which he was riding when it collided with Morrison's train, extra 501. But this construction of the testimony is not warranted; for the testimony certainly tends to show, and the jury were authorized in finding, that Branen, at that very time, was filling the position of trainmaster, and that he was also acting as foreman of the laborers on that train that day. In other words, he was, to quote the language of respondent's brief, "intrusted with the duty of seeing that the trains did not collide with each other; and this was a continuing duty upon his part. It was his duty to issue an order for the purpose mentioned whenever the circumstances, to the mind of a prudent man, required it to be done. To say that the evidence does not show that he had any authority to enforce obedience to any order he may have given is to overlook the legal principle involved." In *Merrill v. Oregon Short Line*, 81 Pac. 86, 29 Utah, 264, 110 Am. St. Rep. 695, we find this language used by the Supreme Court of this state: "Independent of some statute defining fellow servant, * * * the test established by the Supreme Court of the United States * * * as to when negligence is that of the master or of a fellow servant is whether the negligent act is a breach of positive duty owing by the master to his servant. If it is, then negligence in the act is negligence in the master. * * * It must be conceded that it is settled in law that among the primary and positive duties of the master, owing to his servant, is the one of using ordinary care to promulgate and enforce reasonable rules and regulations for the safety of his servants when the nature of the business or the work requires it, and that this duty is nondelegable." "An employer does not discharge his whole duty by merely framing and promulgating proper rules for the conduct of his business and the guidance and control of his servants. He is also under the obligation of enforcing the rules in so far as that result can be attained by exercising a reasonably careful supervision over his business and his servants. In other words, a master's duty does not end with prescribing rules calculated to secure the safety of his employees. It is equally binding on him honestly and faithfully to require their observance." Labatt,

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Mast. & Serv. § 214. When the master places a servant in a position where it becomes necessary for him to make rules or issue orders to his or its employees in carrying out the positive duties of the master, then such servant stands in the place of the master; and if the master could enforce obedience to such rules and orders the servant could do likewise, and it would be his duty to do so. "Where reasonable rules adopted by the master for the government of the employees are brought to their knowledge, an implied undertaking to observe them enters into the contract of employment, and it is the duty of the servant to obey these rules." 20 A. & E. Enc. Law (2d Ed.) 105, and notes. If it is the duty of the servant to whom the order is given or rule promulgated to obey, it would seem that the master, or his representative, who issues the order and promulgates the rule, should be held even more strictly to a faithful observance thereof.

On behalf of the appellant it is further contended that "there is nothing in the record showing anything that Branen should or could have done to prevent the accident." The record shows the movements of the work train extra 636 during the day of the collision; that when it left bridge 4, where it had been standing for two hours in the afternoon, everybody got on it. This was about 4 o'clock. The track was straight for a mile; then it grew crooked from there west, passing through a rough and mountainous country, which obstructed the view. Branen was on the east end of the train when it started west, but immediately walked the entire length of the train and took a position at the west end of the caboose, on the front platform. The caboose was on the west end of the train, and the engine was in the middle of the train. The train had gone west about 3½ miles from bridge 4 when the collision occurred on the commencement of a curve at the west end of a bridge. There is a conflict in the testimony as to the rate of speed of the train No. 636 at the time of the collision; but no flagman was out to protect the train from any east-bound train that might be approaching from the west, and the jury were authorized to find that Branen, well knowing that the train was running in violation of bulletin order No. 3, issued by himself, without being flagged, did nothing to enforce the order, and that ordinary care exercised by Branen would have averted the collision; for, when he saw that the train crew of the train upon which he was riding was disregarding one of the rules which he had promulgated for the safety of the train crews, it was his duty to issue such further order as, under the circumstances, was necessary to protect any train that might be coming east in the belief that it would encounter no danger, by reason of bulletin order No. 3. He was vested with authority to do so, and the trainmen well knew that, and presumably would have obeyed him. This court, in the case of *Merrill v. Short Line*, supra, has decided that it is as much a primary duty of a railway company to use ordinary

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care to enforce rules as to promulgate them. "The doctrine which appellant here invokes—that the master's duty was performed when he promulgated rules, and used ordinary care in selecting men to enforce them—cannot obtain; for the care with respect to enforcing the rules is as much a primary and non-delegable duty as the one of promulgating rules, or of furnishing a safe place or appliances." The jury might well have found that Branen did not do anything to compel compliance with bulletin order No. 3, and that there was great peril in the train upon which he was riding proceeding westward at that time of day without the protection of a flag, because of the irregularity with which the trains were running on that division, and that therefore he was guilty of negligence for which the master is liable.

There are a number of exceptions to instructions given by the court, and the refusal of instructions asked by defendant; but, in view of what is hereinbefore stated, we do not deem it necessary to discuss these instructions in detail. The main objection made by appellant to these instructions is that they should have been made upon the theory that Branen and plaintiff were fellow servants. When the fact was found by the jury that it was Mr. Branen's duty to promulgate orders and rules for the operation of trains, then, as a matter of law, he represented the appellant in that regard, and it became his duty, as a matter of law, to exercise ordinary care and diligence, commensurate with the danger of the service in enforcing the rules and orders promulgated by him. Whether he exercised such care and diligence, under all the circumstances, was a question of fact for the jury; but the duty devolving him was a question of law. The duty is imposed by law. Whether the duty has been met is a question of fact. The jury having, by their verdict, found that Branen was invested with authority to promulgate rules and orders in the conduct of a branch or department of appellant's business, constituted Branen the vice principal of appellant in that regard, and, as such, the duty devolving upon it had to be discharged by him; and the jury having farther determined that Branen did not discharge this duty, and that the injuries complained of were the result of the failure of Branen to do so, and that respondent was free from negligence, the appellant cannot escape liability for the injury sustained by respondent, occasioned by the negligence of its vice principal. It was the duty of appellant to promulgate, and to exercise reasonable diligence to enforce, reasonable rules and orders, with a view of protecting and promoting the safety of its employees in the operation of its trains; and such duty the law imposes in respect to irregular, as well as regular, trains. *Galveston, H. & S. A. R. Co. v. Smith*, 76 Tex. 611, 13 S. W. 562, 18 Am. St. Rep. 78; *Tedford v. Los Angeles Elec. Co.*, 54 L. R. A., note, page 94; *Lewis v. Seifert*, 116 Pa. 628, 11 Atl. 514, 2 Am. St. Rep. 631.

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Whether this duty has been met, of course, depends upon the facts and circumstances of the particular case on trial; and the jury having, by their verdict, declared that it was not met in this case, and there being no errors of law appearing from the record, the judgment should be, and accordingly is, affirmed, with costs.

MCCARTY, C. J., and FRICK, J., concur.

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(Supreme Court of Indiana, Jan. 30, 1907.)

[79 N. E. Rep. 1040.]

Master and Servant—Injuries to Servant—Warranties—Foreign Cars—Inspection.*—When a railroad company, in the general conduct of its business, receives a foreign car for transportation, or to be handled in switchyards, it must exercise reasonable care to inspect the car to ascertain if it is in a reasonably safe condition, and, if found out of repair, either to repair the same or notify those of its employees who may be called on to handle it of the danger or defect.

Same—Complaint.—In an action for injuries to a switchman the first paragraph of the complaint alleged that defendant hauled a certain defective and dangerous car, with a large nail projecting about four inches from the brake beam in such a position as to come in contact with the person and clothes of a switchman engaged in coupling that end of the car; that plaintiff had no knowledge or notice of the defect in time to avoid it; that defendant might have discovered it on reasonable inspection, by reason whereof defendant failed to furnish plaintiff with a safe place to work and with safe appliances, which resulted in plaintiff's injury. The second paragraph in addition alleged that, immediately on the arrival of the car in defendant's switchyards prior to the accident, defendant inspected the car and found its defective condition, but failed to repair or give warning thereof, though it had sufficient time to do so. Held, that neither paragraph was demurrable for want of facts.

Same—Contributory Negligence—Proximate Cause.†—Plaintiff, an experienced switchman, having full knowledge of the operation of cars in defendant's yards and control of the switch engine with which he was employed, was injured while endeavoring to couple certain cars equipped with automatic couplers. Plaintiff, with knowledge that it was dangerous so to do, attempted to open the coupler of a moving car attached to the engine, by running in advance of it, and while so doing was caught by a nail projecting from the brake beam, thrown down, and run over. Plaintiff could have stopped the car and opened the coupler on it and then signaled the engineer to back and make the coupling, or he could have signaled for reduced speed

*See foot-notes appended to *Risque's Adm'r v. Chesapeake & O. Ry. Co.* (Va.), 20 R. R. R. 306, 43 Am. & Eng. R. Cas., N. S., 306; foot-notes appended to *Wood v. Rio Grande Western Ry. Co.* (Utah), 18 R. R. R. 20, 41 Am. & Eng. R. Cas., N. S., 20.

†For the authorities in this series on the question what is, and is not, the proximate cause of an injury, see foot-notes appended to *Paquin v. Wisconsin Cent. R. Co.* (Minn.), 21 R. R. R. 639, 44 Am. & Eng. R. Cas., N. S., 639; foot-notes appended to *Hunter v. Atlantic Coast Line R. Co.* (S. Car.), 20 R. R. R. 55, 43 Am. & Eng. R. Cas., N. S., 55.

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and run ahead of the car and opened the coupler of the standing car, either of which methods would have been safe. Held, that plaintiff's negligence in selecting a dangerous method to do the work and not the nail protruding from the brake beam was the proximate cause of the accident, which precluded a recovery.

Gillett, J., dissenting.

Appeal from Superior Court, Porter County; Harry B. Tut-hill, Judge.

Action by Fred O. Hamlin against the New York, Chicago & St. Louis Railroad Company. From a judgment for plaintiff, defendant appeals. Case transferred from Appellate Court under Acts 1901, p. 565. Reversed with instructions.

Olds & Doughman, for appellant.

Marvin E. Barnhart, *V. S. Reiter* and *L. Bomberger*, for appellee.

HADLEY, J. Appellant appeals from a judgment rendered in favor of appellee for personal injuries claimed to have been caused by the former's negligence.

The accident happened at Stoney Island, a large distributing switchyard of appellant, near the city of Chicago, in the early morning of July 1, 1903. The plaintiff, a practical switchman of 16 years' experience, was employed by appellant, and was acting as head switchman of a crew engaged at Stoney Island in breaking up trains as they arrived in the yard, and switching the cars to the various roads and tracks to which they severally belonged. The plaintiff, being the head switchman, had command over the movements of the engine and it was the duty of the engineer (which he faithfully performed) to respond to whatever signals the plaintiff communicated. About 4 o'clock on the morning of July 1, 1903, No. 35, a mixed train of about 20 cars, arrived at Stoney Island from Buffalo, and the crew to which the plaintiff belonged was set to work distributing it. Prior to breaking up the train, however, competent car inspectors examined the train, and one Medland, an inspector, testified that he discovered on car No. 3847, Duluth, South Shore & Atlantic, from Buffalo, a projecting nail, to wit, a bolt went through the end of a brake beam which hung about 15 inches above the surface of the track, and immediately over the rail, and rested about six inches back of the end of the car, which bolt passed through the brake head and projected outward toward the end of the car about 1½ inches; through the projecting part of the bolt was a slot immediately outside the nut, and through the slot, as ordinarily constructed, should have been inserted a soft iron split key, turned outward and backward, around the bolt to prevent the escape of the nut. The soft iron key was missing, and in its stead a nail had been forced through the slot, and the point turned outward toward the end of the car, and thus projected about one inch further than the bolt. Two cars had been thrown out of the train on the main tract and left standing.

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A little later the engine, pushing five cars, under the direction of the plaintiff, started down the track to pick up the two standing cars. The cars were backing toward the west. The plaintiff was riding on the side ladder near the northwest corner of the advanced car, which was car No. 3847, containing the projecting nail. It was equipped with the Trojan coupler. The standing car had a coupler that coupled in the same way. The cars, by the devices, could be coupled by lifting the pin and opening the knuckle of either one of the cars. It was not necessary to open both. The manner of coupling by these devices was by raising with the left hand a lever located under the northwest corner of the car the plaintiff was riding, to a holding notch that would support the lever. The lever would thus lift the pin, and then the coupling might possibly be accomplished by reaching round the end of the moving car and with the right hand open the knuckle on the moving car, then clear the track and let the cars collide and make the coupling, or the coupling might have also been made by going in advance of the moving car to the standing car and to the other side of the track, to the southeast corner of the standing car, lifting the lever to the notch, opening the knuckle, then recross the track to the north side, the engineer's side, to give the necessary signals; or the coupling might be made by stopping the moving car until the knuckle in it, or in the standing car, could be opened, and then signaling a collision of the cars. On the occasion of the accident the plaintiff rode the moving car till it drew near to the standing car. He then signaled the engineer to slow up, which he did, to the rate of two miles an hour. The plaintiff then lowered himself from the ladder, and lifted the brake lever with his left hand. The notch was out of repair and would not hold the lever, so holding the lever in his hand he stepped in front of the moving car, stepped over the rail, first with his right foot, extending his right hand, and laying it upon the coupler to open the knuckle, and as he carried the left foot over the rail something caught him on the inside of the left leg, midway between the foot and the knee, which threw him to the track between the rails, and the forward trucks of the car passed over him inflicting the injuries for which he sues. The presence and position of the nail was not reported to the company, was not repaired, and no notice thereof was given to the plaintiff and other employees whose duty it was to handle and manage the train. The plaintiff had no knowledge of the nail and could not testify that it was the nail that caught him and caused him to fall on the railroad track.

The substance of these facts was averred in two paragraphs of complaint. A demurrer to each paragraph for insufficiency of facts, was overruled. There was an answer of general denial, verdict for the appellee, and answers to interrogatories. A motion for judgment on the answers to interrogatories was overruled, as was also appellant's motion for a new trial. An

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assignment of error is made on all adverse rulings. Was the complaint sufficient against the demurrers?

The negligence alleged in the first paragraph was that the defendant hauled from Buffalo a certain defective and dangerous car, No. 3847, belonging to the Duluth, South Shore & Atlantic Company. The defect is described, and then it is averred "that a large nail was negligently placed and maintained on said brake beam in a bent condition that projected and extended outward from the brake beam toward the end of the car, a distance of about four inches, and was about 18 inches above the surface of the ground, and in such a position as to come in contact with the person and clothing of the switchman engaged in coupling that end of said car. It is then alleged that the plaintiff had no knowledge of the defective and dangerous condition in time to avoid it, and the defendant negligently failed to give him notice thereof, although the defendant might have discovered it upon reasonable inspection; by reason whereof the defendant negligently failed to furnish the plaintiff with a safe place to work and with safe appliances. The second paragraph is like the first except it is averred that immediately upon its arrival in the yard at Stoney Island, the defendant inspected the car, and found the defective condition described, and, knowing of said condition, the defendant negligently failed to repair—though it had plenty of time—and wholly failed to give the plaintiff, notice, or warning thereof.

The objection presented to these paragraphs by appellant's counsel is that neither states sufficient facts to constitute negligence in appellant that appears to be the direct or proximate cause of the plaintiff's injuries. In a nutshell, the first paragraph appears to be based upon a failure to inspect a foreign car, and the second paragraph upon a failure to repair, or to give the plaintiff notice of the defect. When a railroad company in the general conduct of its business, receives a foreign car to be transported over its lines, or handled by its employees in its general switchyards, it must, under all circumstances, exercise such reasonable care as the time, place, and exigencies of business will permit, to inspect such car, to ascertain if it is in a reasonably safe condition, and, if it is found to be out of repair, unfit or unsafe for the business for which it is being employed, to repair such car to a reasonably safe condition, or to notify those of its employees who may be called upon to handle it, of the danger or defect. *Railway Co. v. Bates*, 146 Ind. 564, 45 N. E. 108, and cases cited. So in this case appellant owed the appellee, as one of its switchmen, the duty of giving car No. 3847, from Buffalo, a reasonable inspection—which it is averred in the first paragraph of the complaint it did not do—and furthermore it was a duty owing to the plaintiff to restore any discovered defect, or dangerous condition, or to notify the plaintiff of the existence thereof, all of which, it is alleged in the second paragraphs, the defendant failed to do. Neither para-

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graph of the complaint is subject to the general objection stated, and no special objection to either paragraph being pointed out, we hold both paragraphs sufficient.

The jury specially found, in answer to interrogatories, that at the time of his injuries the plaintiff had control of the movements of the engine, it being the duty of the engineer to receive and obey all signals received from the plaintiff. Appellee was an experienced switchman, having served in that capacity in various yards for 16 years. There were at the time two perfectly safe ways in which the coupling might have been accomplished. One was by signaling and stopping the moving car, then opening the knuckle upon it, and signaling the cars pushed together. This would have consumed about one minute of time. The second way was for the plaintiff to cause the speed of the moving car he was riding to be slackened, two or three car lengths distant from the standing car, and then hurrying forward in advance of the moving car, and opening the knuckle of the coupler, on the standing car, then stepping outside the track, and permitting the cars to come together. It was dangerous to attempt to open the coupler on the moving car by running ahead of it, as the plaintiff was attempting to do at the time of the accident. Upon the strength of these findings appellant insists that, even though car No. 3847 was out of repair and defective by reason of having the nail projecting from the bolt in the brake beam, yet, if appellee had used due care in his method of making the coupling, no harm would have come to him from the nail, and to sustain the contention invokes the well-established rule, found in the domain of master and servant, that when there are two known ways of doing a thing, one safe and the other unsafe, if the servant voluntarily and knowingly chooses, because easier or more convenient, or for other personal reasons, the unsafe way, he will be held guilty of negligence, and, if injured by reason thereof, will have no remedy. *Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Publishing Co. v. Beaumeister*, 102 Va. 677, 47 S. E. 821; *Schoultz v. Eckardt Co.*, 112 La. 568, 36 South. 593, 104 Am. St. Rep. 452; *Gilbert v. Railroad Co. (C. C.)* 123 Fed. 832; *Morris v. Duluth Ry. Co.*, 108 Fed. 747, 47 C. C. A. 66; *Railroad Co. v. Estes*, 37 Kan. 715, 731, 732, 16 Pac. 131; *Carrier v. Railway Co.*, 61 Kan. 447, 59 Pac. 1075; *Haven v. Bridge Co.*, 151 Pa. 620, 25 Atl. 311; 1 Bailey, Personal Injury, §§ 1121, 1123; 5 Thompson's Negligence, § 5372, and cases collected. *Quirouet v. Ala., etc., Co.*, 111 Ga. 315, 318, 36 S. E. 599; *Moore v. Kansas, etc., Co.*, 145 Mo. 572, 48 S. W. 487.

In the Pennsylvania Case, the defendant was reconstructing a bridge. To accommodate travel while taking down the old bridge the roadway was prepared to accommodate both vehicles and foot passengers, and the footways were being demolished. They were torn up for more than half way. The entrances to the footways were blocked, and the sentry informed the

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plaintiff and companion that they would have to take the roadway, as the footpaths were unfit for travel. They took the roadway and when about two-thirds over they left the roadway and entered upon the footway at a point where the workmen had not reached in their work of tearing up. The roadway was perfectly safe for the rest of the distance. On the footway the plaintiff stepped on a board lying bottom side up, with a nail protruding upward, that penetrated the plaintiff's shoe, causing her to fall and injure herself. At page 627 of 151 Pa., at page 312 of 25 Atl., the court say: "The case is brought directly within the familiar line of decision, which holds that, when a person, having a choice of two ways, one of which is perfectly safe, and the other of which is subject to risks and dangers, voluntarily chooses the latter and is injured, he is guilty of contributory negligence, and cannot recover." In the Quirouet Case the plaintiff, an employee, attempted to board a loaded flat car, moving in a train at the rate of five or six miles an hour, and which car was the fourth from the caboose, the proper car for him to board, and which was equipped with low and convenient steps and could have been boarded with perfect safety. In his effort to board the flat car he put his foot upon the journal, or grease box, and springing, threw his hand and wrist around a heavy standard in the side of the car, which rolled in its socket causing the plaintiff's foot and leg to fall under the wheels. The court said with respect to these facts: "While it was more convenient, still he (plaintiff) could have reached the car by going first upon the caboose, * * * which had appropriate appliances for going upon it, and it was his duty to have used the more appropriate and less dangerous method. In such cases the use of the more dangerous method, even though it be the greater convenience, preclude recovery, if injury results. * * * If there are two apparent ways of discharging the required service, one more dangerous than the other, the employee is bound to select the latter, and is guilty of such negligence as will bar an action for damages if he selects the former and is injured thereby." In section 1121 Mr. Bailey says: "It is a familiar principle, which common sense, as well as the rules of law, ought to teach anyone, that, where an employee of a railroad knowingly selects a dangerous way when a safer one is apparent to him, and is thereby injured, he is guilty of contributory negligence." The rule is rooted in the principle of public policy that enjoins upon every one the duty of exercising due care to preserve his body and health from mutilation and injury. The individual is given strength, reason, ears, and eyes, as a means of general protection, and he is in duty bound to employ these under all circumstances in a reasonable manner for the promotion of his own personal safety. So, in whatever station, or in whatever place he may be, the employee is never excused for an abandonment of care in the avoidance of bodily harm. Even the quantum of care imposed by law upon the

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master, in providing a suitable and safe working place and appliances for his servant, does not in any degree diminish the servant's duty to take care of himself and heed any apparent danger, whether the same is usual or extraordinary, and a servant with knowledge of existing perils, gained through observation, or from a long continuance in the business, is bound to make use of such knowledge, and look out for such dangers as experience has taught him is liable to produce injury. *Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Pennsylvania Co. v. Finney*, 145 Ind. 551, 558, 42 N. E. 816; *Railroad Co. v. Ostman*, 146 Ind. 452, 464, 45 N. E. 651; *Railway Co. v. Adams*, 105 Ind. 151, 5 N. E. 187. In the *Hoodlet Case* it is said: "The law requires that men shall use their senses with which nature had endowed them, and when, without excuse, one fails to do so, and is injured, in consequence, he alone must suffer. * * * In no case will the master be held liable to the servant where the latter brings an injury upon himself, which he might have avoided by the exercise of reasonable care." The general verdict for the plaintiff implies a finding that he was not guilty of contributory negligence, and, if the record shows more than a scintilla of evidence in support of such a finding, we are not permitted to disturb it. But it is a rule firmly established that, while negligence is generally a question for the jury, and always so when the facts are in controversy, yet, when the facts are agreed upon, or without dispute, or have been judicially determined, and reasonably admit of but one inference, then whether such facts constitute negligence, or due care, becomes a question of law for the court. *Stroble v. New Albany*, 144 Ind. 695, 698, 42 N. E. 806; *City of Franklin v. Harter*, 127 Ind. 446, 448, 26 N. E. 882; *Railroad Co. v. Walborn*, 127 Ind. 142, 148, 26 N. E. 207; *Salem v. Walker*, 16 Ind. App. 687, 693, 46 N. E. 90; *Telegraph Co. v. McDaniel*, 103 Ind. 295, 299, 2 N. E. 709; *Railroad Co. v. Spencer*, 98 Ind. 186, 190.

The following facts were determined by the jury in answers to interrogatories propounded by the court: The plaintiff had had 16 years of experience as a yard switchman. On the occasion of his injury he had full control of the movements of the engine, the engineer being under orders to obey his signals. He was familiar with the Stony Island yard, and how to use and manipulate the various couplers in common use by railroads. Immediately before the accident he saw that the cars to be coupled were both equipped with familiar automatic couplers that were operated in the same way; that it was necessary to open the knuckle of but one, not both, couplers, and it made no difference which one. "Was it not dangerous and hazardous to attempt to open the coupler on the moving car by running in advance of it, as the plaintiff was attempting to do at the time of the accident? Ans. Yes. Was not the plaintiff injured by attempting to open the knuckle of the coupler upon the car while the same was in motion, by stepping immediately in advance of

it? Ans. Yes. Could not the plaintiff, with perfect safety, have signaled and stopped the moving car and opened the knuckle upon it, and then signaled it to move against the standing car and made the coupling? Ans. Yes. Could not the plaintiff have made the coupling he was attempting to make at the time he was injured with perfect safety to himself by slackening the speed of the moving car two or three car lengths distant from the standing car and going in advance of the moving car and opening the knuckle on the standing car, then stepping outside the track and letting the cars come together? Ans. Yes." Under the rule we have been considering, the special findings just set out lead irresistibly to the conclusion that the plaintiff was not, at the time of his accident, exercising due care to avoid the injury, and are sufficient to impose upon the court the duty of characterizing the act. He was injured by attempting to open the knuckle of a coupler on a moving car by stepping directly in front of it. The act he attempted was dangerous and hazardous irrespective of the projecting nail, and known to the plaintiff to be dangerous at the time he set about making the coupling. He could not ignore his 16 years of experience as a yard switchman, which embraced the coupling and uncoupling, and the various movements of cars in breaking up, and making up, of trains. He was bound to use his faculties, and will be held to know, from his long service, that the stepping immediately in front of a moving car to adjust the coupler is dangerous from the liability of losing one's footing, from slipping, stubbing the toe, and stumbling from other causes. *Pennsylvania Co. v. O'Shaughnessy*, 122 Ind. 588, 23 N. E. 675; 1 *Bailey's Personal Injuries*, § 1125. At the time he selected the unsafe method he had before him two perfectly safe ways, both available, and both under his absolute control, and neither of which would have delayed the movement of the cars more than one minute. "It is abhorrent to reason and common sense," says the court in *Loranger v. Railway Co.* (Mich.) 62 N. W. 137, "to say that it is good and safe railroading and careful conduct for a brakeman to step in front of a train moving as fast as a fast walk, and perform the service which requires him to step sideways to keep out of the way, knowing that death is almost sure to follow should he miss his footing."

But appellee contends that the proximate cause of his injury was the protruding nail, and not the going on the track in front of the moving train, and, since he had no knowledge of the nail, and no reason to expect it, negligence cannot be imputed to him for encountering it. It is commonly said in the books that a wrongdoer is only answerable for such injuries as are the direct and proximate results of the negligent act or omission, or in other words, the negligent act or omission must be shown to be the immediate and proximate—not remote—cause, of the injury, and, whether proximate or remote, is generally a question for the jury, but sometimes a matter of law for the court, determinable from the evidence in each particular case. *Davis*

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v. Mercer Lumber Co., 164 Ind. 413, 423, 73 N. E. 899; 21 Amer. & Eng. Ency. (2d Ed.) p. 508. The rule generally adopted being akin to the one applied to questions of negligence, namely, that when the facts are admitted, or without dispute, so that the court has the same information concerning the facts as the jury, then it becomes a question for the court, but when the facts are in controversy the question should go to the jury. *Mahoney Township v. Watson*, 116 Pa. 344, 351, 9 Atl. 430, 2 Am. St. Rep. 604; *Stone v. Boston, etc., R. Co.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794; *Kitchen v. Carter*, 47 Neb. 776, 66 N. W. 855; 21 Amer. & Eng. Ency. of Law (2d Ed.) 509.

We have seen that the substantial facts relating to the plaintiff's injury, have been established by the special findings of the jury, and the evidentiary facts, as testified by him, are uncontradicted by any other witness, so it becomes the duty of the court to declare upon the facts the responsible agent of the injury. In this we are unable to accept appellee's contention that it was the nail and not his entry upon the track in front of the moving cars that was the direct and efficient cause of his hurt. There has been much learning indulged by the courts in defining the distinction between the paramount or efficient cause of an accident, and the causes that are merely incidental or instrumental, to the superior responsible agency. There is, however, no use for it here, for call the incident what you will, it seems impossible to reach the conclusion that the projecting nail was the proximate cause of the injury. Being the nearest in order or time is no criterion. The proximate cause is that cause which originates and sets in motion the dominating agency that necessarily proceeds through other causes as mere instruments, or vehicles, in a natural line of causation to the result. *Pennsylvania Co. v. Congdon*, 134 Ind. 226, 33 N. E. 795, 39 Am. St. Rep. 251; *Billman v. Railroad Co.*, 76 Ind. 166, 40 Am. Rep. 230. Suppose appellee, desiring to cross to the other side of the track, attempted to do so by passing under one of the cars of the moving train. While under the car in transit, an unexpected and broken rod caught his clothing and delayed him so that he was overtaken and injured by the wheels. Could it be said in that case that the broken rod was the efficient and proximate cause of the injury? Such a parallel cannot be avoided by saying that he went into a dangerous place where his business did not call him, and where he was not expected to go, for appellee did precisely that thing when he attempted to open the knuckle of car 3847 in the manner he did. The coupling pin of the Trojan coupler, with which the car was equipped, was raised and dropped through the link by a lever operated at the side and end of the car, thus removing all necessity for the switchman to go between the cars to effect the coupling when the cars came together. These coupling devices have been long in use by railroads as a means of protecting their employees from the danger of being crushed between cars while making a coupling, and the appellee knew it; from his 16 years' experience he was bound to

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know it, and to know that he had no business to go, and was not expected to go, in front of moving cars to open a coupler—into a peril but little less than the position between cars when they are driven together. From any point of view this much is certain: the appellee's negligence in going in front of the car contributed to his injuries, or at least concurred with the nail in producing them. If he had not wrongfully gone to, and cast himself upon, the nail, it would not have harmed him. The final cause was the car running upon him. The first and dominating cause was the going into the place that made the result possible.

We therefore conclude that the record shows affirmatively that appellee was guilty of contributory negligence.

There are other questions presented arising upon the instructions, the interrogatories, and upon the admission and exclusion of testimony, which, for the most part raise the same questions that have been decided, and the others are not likely to arise again, hence they have been passed without consideration.

Judgment reversed, with instructions to grant appellant a new trial.

GILLET, J., dissents. MONKS, J., concurs in result.

TAY v. WILLMAR & S. F. RY. CO.

(Supreme Court of Minnesota, Feb. 8, 1907.)

[110 N. W. Rep. 433.]

Master and Servant—Injury to Railroad Employee—Question for Jury.*—The plaintiff was a sectionman in the employ of the defendant and while engaged with his foreman in repairing a side track in its railway yard, which necessitated the taking out of an old rail and putting another in its place, he was injured by the negligence of his foreman in releasing his hold upon a rail without warning and letting it fall upon him. Held, upon a consideration of the facts stated in the opinion, that it was a question for the jury whether the plaintiff's employment involved an element of hazard peculiar to railroad business.

(Syllabus by the Court.)

Appeal from District Court, Kandiyohi County; G. E. Qvale, Judge.

Action by A. W. Tay against the Willmar & Sioux Falls Railway Company. Order dismissing action and from an order denying new trial, plaintiff appeals. Reversed, and new trial granted.

W. E. Dodge, E. L. Sutton, and George H. Otterness, for appellant.

*For the authorities in this series on the question what is, and is not, "railroad work," within the meaning of employers' liability acts, see foot-notes appended to *Dunn v. Chicago, etc., Ry. Co.* (Iowa), 21 R. R. R. 376, 44 Am. & Eng. R. Cas., N. S., 376.

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W. R. Begg, C. H. Winsor, W. F. McNaughton, and Samuel Porter, for respondent.

START, C. J. The plaintiff was in the employ of the defendant as a sectionhand, and on March 9, 1906, he was injured while engaged with the section foreman in the repair of the defendant's railway tracks by the alleged negligence of the foreman, and he brought this action in the district court of the county of Kandiyohi to recover the damages sustained by reason of the injury. The trial court at the close of the plaintiff's evidence dismissed the action, and he appealed from an order denying his motion for a new trial.

The basis of the decision of the trial court was that the work the plaintiff was engaged in at the time he was injured was not such as to expose him to any of the hazards incident to railroading. This is the only question for our decision. The facts are not disputed and are substantially as follows: The defendant is a railway corporation and operates a line of railway from Wilmar southwesterly through the village of Ruth-ton, this state, to points without the state. The plaintiff on and prior to March 9, 1906, resided at Ruth-ton, a station on defendant's line, and then was, and for 16 months had been, in the employ of the defendant as a sectionhand. The section crew consisted of himself and his foreman, who had the care and repair of a section of the line some six miles long, which included the yard and tracks at Ruth-ton, consisting of a main track, a passing track, and a side or industry track. Both of the latter were east of the main track in the order named. The passing track was connected with the main track by two switches one-quarter of a mile apart, the passing track was one-quarter of a mile in length, and the side track was connected with the passing track by two switches, the side track was 150 feet shorter at each end than the passing track, and there was that distance between the switches connecting the passing track with the main track and the switch connecting the side track with the passing track. The passing track and the side track were both so constructed with reference to the main track that trains or cars from either direction could be switched on to either track. To the east on the side track there were located several grain warehouses, a stockyard, a wood and coal yard and lumberyard. All cars that were to be loaded at the village of Ruth-ton were placed upon the side track and there loaded, and all cars of freight for this station were shunted on the side track for the purpose of unloading. Car loads of freight coming in from the south were often placed on the side track by a flying switch. The side track was almost daily used for the switching of the cars and by the local freight trains. It was necessary to unlock both switches to make a flying switch. On the evening of the day before the accident the plaintiff and his foreman observed that the side track was out of repair, and the foreman then decided to proceed with the work of repairing it on the following morning. Accordingly at about 9 o'clock the next

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morning, March 9, 1906, the work of repair was commenced by the plaintiff and his foreman. The work consisted of taking out and putting back a rail which had tipped over, taking out a worn rail and replacing it with another, and taking out and cutting off a third rail in order that it might fit into place with the new rail. At the time of the accident the tipped-over rail had been righted, but not fastened or spiked to the ties. The wornout rail had been taken out and a new one had been brought from the north end of the side track on a hand car and placed at the side of the track where it was to be used. The third rail had been cut around ready to be broken off in the usual way, which was to cut around the rail while it remained upon the ground, then to lift it up and let it drop across another rail, the impact breaking it where it had been cut. The rail was so heavy that the plaintiff and his foreman could lift but one end of it at a time. It was while they were in the act of thus breaking the rail that the accident to the plaintiff occurred. On previous occasions it had been and was the custom of the foreman when he and the plaintiff were so breaking rails to give him a signal or warning when to let go or drop the rail. The foreman omitted so to do at the time of the accident. Both sectionmen, as was customary, took hold of the rail at one end about four feet apart and lifted it up preparatory to dropping it across another rail to break it off. When it was lifted to a given height the foreman called out "higher" whereupon the foreman immediately let go of the rail, while the plaintiff attempted to raise it higher and being unable so to do or to support the great weight of the rail alone, and by reason of the foreman releasing his hold thereof without warning to plaintiff, it fell on plaintiff's legs, and he thereby sustained the injuries complained of, which consisted of a complete fracture of the tibia of the left leg, four inches above the left ankle, and injuries to both ankles.

The rails taken out for the purpose of repairing the track were distant between 84 and 96 feet from the south switch of the sidetrack, so that the three rails immediately north of the switch remained undisturbed, while the next three were taken out. When the work of repair commenced, as well as during its progress, the foreman stated that it was necessary to hasten the work in order to have the track repaired before the arrival of trains, the foreman having reference to a freight train and a passenger train, both due to arrive at the station of Ruthton from the south at the same time, to wit, 11:27 a. m. on that day, which was the schedule time of arrival of the trains, of which both the plaintiff and the foreman had notice and knowledge. The direction of the foreman to hasten the work was obeyed by the plaintiff. The switches were used and operated exclusively by the trainmen, and, except when so used, they remained locked, and were so locked at the time of the accident. It does not appear whether the freight train or any train on that day had any use for the side track for switching or any

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other purpose. It does appear that any necessary switching, picking up, or spotting of cars on the side track could as well have been done from the south through the north switches and without interfering with, or danger to, sectionmen, train crew, or train, notwithstanding the nonrepair or defect in the side track above mentioned.

The plaintiff and the foreman were fellow servants engaged in the same common employment and the question of vice principal does not enter into this case. The question, then, is whether the facts stated show, as a matter of law, that the plaintiff's employment at the time he was injured did not involve an element of hazard or condition of danger peculiar to railroad business. The statute abolishing the fellow-servant rule as to employees of every company owning or operating a railroad is this: "Negligence of Fellow Servant. Every company owning or operating, as a common carrier or otherwise, a railroad, shall be liable for all damages sustained within this state by any agent or servant thereof, without contributory negligence on his part, by reason of the negligence of any other servant thereof, and no contract, or any rule or regulation of such company, shall impair or limit such liability. But this section shall not be so construed as to render any railroad company liable for damages sustained by any such agent or servant while engaged in the construction of a new road, or any part thereof not open to public travel or use." Rev. Laws 1905, § 2042; Gen. St. 1894, § 2701. The application of this statute, notwithstanding its general terms, has been restricted by the uniform decisions of this court to railway employees who are injured when exposed to the peculiar hazards incident to the use and operation of railroads, and whose injuries are the result of such dangers. The decisions are all referred to and carefully analyzed in the case of *Jemming v. Railway Co.*, 96 Minn. 302, 104 N. W. 1079, 1 L. R. A. (N. S.) 696. This case is relied upon by the defendant as sustaining the conclusion of the trial court. Plaintiff in that case was one of a crew employed by the railway company, and he was injured while he was assisting as a pitman in operating a steam shovel in a gravel pit. The shovel was located upon movable sections of track about six feet long which were not connected with any other track. When it became necessary to move the shovel forward, a section of the track was taken up from the rear and placed in front of the shovel. It was the duty of the pitman to level off a place for a section of the track in front of the shovel and then pick up the ties and rails constituting the rear section and place them in front of the shovel. The plaintiff while so engaged was hit and injured by the dipper connected with the shovel by reason of the alleged negligence of the engineer. It was held that the danger to which the plaintiff was exposed was not a hazard peculiar to the operation of a railway, but one incidental to the management of the machinery, and that the accident would have

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been as liable to occur if the steam shovel had been operated in excavating for the foundation of a building by parties not in the employ of a railway company. The facts in the case cited are not analogous to the facts in the case at bar, which are somewhat similar to the facts in the case of *Blomquist v. Railway Co.*, 65 Minn. 69, 67 N. W. 804. In that case the plaintiff was a sectionman employed with others in repairing the main track of the defendant's railroad by taking up rails, putting in new ties and replacing the rails, a work which had to be done with great and extraordinary haste in order to avoid danger to trains that were or might be approaching. While so engaged the plaintiff and another sectionman were carrying a heavy rail and he was injured by the section man negligently releasing his hold on the rail and letting it fall upon the plaintiff. It was held that the plaintiff's employment involved an element of hazard peculiar to railroad business and that the statute applied. In the case of *Anderson v. Railway Co.*, 74 Minn. 432, 77 N. W. 240 the plaintiff, a railway employee, was at work repairing the defendant's roadbed and was injured by the negligence of his fellow servant in releasing, without warning, a track jack which held up a part of the track. It was held, upon a consideration of the evidence, that it was a question for the jury whether the work was being executed under such conditions as to expose the plaintiff to hazards incident to the use and operation of railroads. In *Kreuzer v. Railway Co.*, 83 Minn. 385, 86 N. W. 413, the plaintiff was injured by the negligence of his fellow servant, while they were engaged in clearing a wreck from the defendant's railway tracks, which caused the roof of a car to fall upon plaintiff. It was held that the evidence made it a question of fact whether the work was being done under such circumstances as to expose the plaintiff to the hazard of railway service. The cases cited clearly indicate that no hard and fast rule or academic definition has been or can be formulated whereby it may be determined what is a railroad hazard and that each case must be adjudged upon its special facts. And further, that the statute is to be treated as a remedial one for the benefit of railway employees, and that it is only in exceptional cases that any railroad employee can be excluded from its benefits. Whether a particular case is within the statute is a question of fact for the jury if the facts are in dispute, or, if admitted, different minds might reasonably draw different conclusions from them. Tested by this rule, and following the cases to which we have referred, we hold that the admitted facts in this case do not show, as a matter of law, that the employment of the plaintiff when injured did not involve an element of hazard or condition of danger peculiar to railroad business. The question was one of fact, and the trial court erred in not submitting the case to the jury. As there must be a new trial for this error, we refrain from discussing the facts.

Order reversed, and a new trial granted.

MCGINNIS *v.* CHICAGO, R. I. & P. RY. CO. *et al.*

(Supreme Court of Missouri, Division No. 1, Dec. 22, 1906.)

[98 S. W. Rep. 590.]

Master and Servant—Acts or Omissions of Servant—Liability of Master to Third Persons.*—Where a servant negligently fails to do what should have been done, the master alone under the rule of a respondeat superior is liable to third persons, but, where a servant negligently does what he should have done properly, the servant and the master are both liable to third persons.

Same—Joint Liability of Master and Servant—Effect of Verdict for Servant.—An employee of a railway company sued the company and a fellow employee for injuries sustained while the employee and fellow employee were lifting a hand car on top of lumber loaded on a tool car, in consequence of the fellow employee letting go of his hold of the car. The jury found that the fellow employee was free from negligence. Held that, as the right to recover from the company was dependent on the doctrine of respondeat superior, the employee was not entitled to a verdict against it.

Appeal from Circuit Court, Clinton County; Alonzo D. Burnes, Judge.

Action by Thomas J. McGinnis against the Chicago, Rock Island & Pacific Railway Company and others. There was a judgment for defendant French and against defendant the Chicago, Rock Island & Pacific Railway Company, and it appeals. Reversed.

M. A. Low, Paul E. Walker, and Frank P. Sebrec, for appellant.

Pross T. Cross and John A. Cross, for respondent.

GRAVES, J. Action for personal injury. Suit was instituted against defendant the Chicago, Rock Island & Pacific Railway Company, and two of its employees, Welsh and French. Upon close of plaintiff's evidence the trial sustained a demurrer to the evidence as to defendant Welsh, but overruled the demurrers of the other two defendants. After the evidence closed the case was submitted to the jury and a verdict returned in favor of defendant French, but against the defendant company in the sum of \$10,000. Upon this verdict judgment was rendered against defendant company for the said \$10,000 and costs. After unsuccessful motion for new trial an appeal was duly perfected and taken to this court by the railway company.

In the petition it is alleged that plaintiff and defendants Welsh and French were employees of defendant railway as members of a gang of bridge carpenters; that defendant Welsh was foreman of the gang; that on the day of the accident, February 6, 1903, they were working near or at the station of Dearborn, Mo.; that defendant Welsh ordered a tool car to be loaded with some old bridge lumber, and after the lumber was placed

*See extensive note appended to *Southern Ry. Co. v. Grizzle* (Ga.), 20 R. R. R. 451, 43 Am. & Eng. R. Cas., N. S., 451.

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on the car ordered some hand cars to be placed on top of the lumber; that after the cars were placed thereon, with wheels down, the defendant Welsh ordered plaintiff and other co-laborers to turn them over; that the lumber was so placed on the car as to make the place dangerous to work on. The petition then proceeds as follows: "That, in obedience to said orders and commands of defendant Welsh, plaintiff and defendant French took hold of and lifted on the handles of one end or side of said hand cars, and two of said other hands took hold of and lifted on the handles of the other end of said car, and that, when one side of said car was raised from off said timbers, the defendant French, while in the line of his duties to defendant railway company, although knowing and seeing plaintiff's perilous position on the edge of said loaded car, did carelessly, negligently, and wantonly let go of his hold on said car and ceased to help plaintiff to hold and lift the same, and wantonly and negligently shoved and pushed said car towards plaintiff, and that on account of all the above said hand car moved and slid towards and onto plaintiff, and he was, without any fault or negligence on his part whatever, pushed and forced over the side and edge of said loaded car, and onto the ice and frozen ground below, with great force and violence, and permanently injured as hereinafter set out. (3) That the negligence and wantonness on the part of the defendant was as follows: (a) That the defendant French, while so helping to lift and hold said hand car, negligently, wantonly, and carelessly pushed and shoved said car onto and toward plaintiff; (b) that the defendant French, while helping to lift and hold said hand car as aforesaid under the said orders and commands of the said Welsh, negligently and wantonly let go his hold thereon and ceased to hold and help hold said hand car; (c) that the defendant Welsh, in the line of his duties to defendant railway company, negligently ordered and required plaintiff to get on top of said loaded car to assist in lifting said hand cars when it was dangerous and unsafe for plaintiff to do so, and this the said Welsh well knew, or could have known by the exercise of ordinary care." The petition then described the character of the injuries and alleged damages in the sum of \$2,566.

The separate answer of each defendant was practically the same—(1) a general denial; (2) an admission that plaintiff and defendants Welsh and French were members of a gang of bridge carpenters, and that plaintiff fell from the car and received slight injuries, but denied the seriousness of the injuries; (3) and a plea of contributory negligence. Reply is a general denial.

With the views we have of this case, an extended statement of the evidence is not required. Plaintiff, after testifying to his employment by defendant company and that defendants Welsh and French and three others, Ferguson, Kincade, and Pardee, were likewise employed on the bridge gang of carpenters, and that Welsh was a carpenter the same as he was,

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"only he was a straw boss," described the manner of his injury thus: "Q. Go ahead, Mr. McGinnis, and in your own language tell what took place. A. Well, we had a hand car or push car for our tools. We had removed some of the bridge timber out of a couple of spans of bridge, and Mr. Welsh come to the conclusion he would load this bridge timber. So we loaded it on our tool car, as you might call it. It was part boxed, about eight feet boxed and the balance a flat car. We started in to load the timber until it was above the top of the box car. After we got the timber on Mr. Welsh says, 'Now, take hold and run the push car on top of the bridge timber.' So we fastened the ropes to the rubble car and pulled it on. Q. State your position while putting the car on. A. My position was on the ground with Mr. Welsh. The other men were on top of the car, holding the ropes. We simply pulled it up until it got out of our reach, and then Mr. Welsh told me to get on top of the car and help pull it up. I got up and we helped, and then he ordered us to turn it over on its back, turn the wheels up— Q. Now, state the position of the rubble car on top of this bridge timber. Did it set crossways or lengthways? A. Crossways, just as it come up. Q. Go ahead and state what you done. A. After we got it up there we all got around it. I believe it was Kincaide that— Q. State what orders, if any, Mr. Welsh gave you there as to your position. A. Mr. French stood to the opposite corner, and I was the left of French. Mr. Welsh said to me, 'You get around on the end of the car where you can do something.' Well, I stepped around and we started to pick it up. We got it on its edge and Mr. French give the car a shove, started the car up like that, and the car fell and I just went off on the hard ground. Q. When he shoved the car, state what direction it fell in. A. Well, it went south. I think the road runs in an angle that way at the depot there. Q. When he gave the shove, did he continue to hold the car? A. No, sir; he just shoved and stood back. Q. He let go of the car? A. He let go of the car. Q. At the time you was lifting the car on, you said you was at the west end of the car? A. I was at the west end of the car. Q. Where was French? A. On the north side of the car. Q. On the north side of the car? A. Yes, sir; at the corner. Q. The same corner you was at the end of? A. Yes, sir. Q. Now, where were the other three men holding the car? A. On the east side of the car. Q. Then you and French were left— A. We were lifting there together. Q. To lift that entire part of the car? A. Yes, sir. Q. And when he let go of the car, you had no other assistance, A. I had no other assistance. I was alone at the end of the car. Q. Were the three men on the other end still holding the car and lifting? A. They had hold I expect, but I wasn't given any time. After it started to go I went off like a shot and dropped on the ground. Q. Did you have any notice of any kind? A. No, sir; no warning or notice of any kind whatever. Q. State, Mr. Mc-

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Ginnis, how much space there was between the west end of the push car and the edge of the car loaded with bridge timber for you to stand on. A. I expect maybe 14 inches. Not over the width of the stringer, if that much. Q. After you fell off, state what was done. A. Well, after I dropped on the ground, French he laughed at me. Q. French laughed at you? A. French laughed at me. Of course, I thought my feet was all mashed to pieces, and when I tried to stand up and couldn't do it, I crawled on my hands and knees to get to the other side. They let me lay there until they loaded the car. After they finished loading the car they picked me up and carried me into the bunk car, and French was still laughing."

On cross-examination, he describes the incident thus: "When we picked it up and got it on its side, about like that, Mr. French was here and I was at the end of the car. We turned it on its edge just like that, and then Mr. French started it that way, and he stepped back and the car fell with a slant, like that. It was all done so quick that all I know is French started it, and then he laughed. * * * I was holding the end, just the same as that, the rubble car in that position. When we got her started, of course, I had to follow the car around, but, instead of him going with me and helping me to let it down, he started it and then let go. * * * He shoved it because I was right in there. There was nothing to stop it at all. I had hold of the end of the car, expecting Mr. French to come around with me when he started it. Instead of doing that, he shoved it and then stood back. Just stepped back and give it a shove."

The evidence of the plaintiff was such as to eliminate the question as to unsafe place in which to work, for he says it was safe. The defendants showed that four men were turning the rubble car; that two of them were lifting the car upon the edge, and the plaintiff and another were there to catch it as it came over and ease it down. Defendant's contention is described by French in this language: "Q. What were the positions of these four men with regard to the push car when you turned it over? A. That is our position when we were turning it over. Q. Yes. A. Why, there was myself and Kincade on one side, raising it up, and McGinnis and Ferguson on the other, to catch it as it come over and let it down. Q. Suppose the main car was placed north and south, that being the main car and that the push car (illustrating the position of the men on the car, and how it was turned over). A. Yes, sir. Q. Turn it the other way. A. I can't tell myself which is north and south here. This is lengthways of the car. This would be the push car across lengthways of the main car. I got at this corner, Kincade at this corner, and McGinnis and Ferguson over on this side. When we raised it up in this manner, they was to catch it and let it down on the other side. Those were our positions as near as I can remember. Q. Who raised the car up? A. Kincade and myself. Q. How far did you raise it up? A. Quite

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perpendicular, until it stood on edge, so they could get hold of it and let it down. Q. Then the men on the other side were to catch it and let it down? A. Yes, sir. Q. What was McGinnis' position on the other side of the car? A. He was over here on this corner, this side of the car. His corner was here, and he was to catch it and let it down. Q. Was he standing opposite Kincade or opposite you? A. Kincade. Q. Who was opposite your corner? A. John Ferguson. Q. After you and Kincade had raised the car up, what was done with it then? A. Why, it was turned on over, and it turned tolerably fast. Q. Did they catch the car on the other side? A. Ferguson caught his corner. I can't say whether McGinnis had hold of his corner or not; but the car was standing up that way, and I couldn't tell on the other side whether he had hold of it or not. It's about as high as a man's head, nearly as high, but then, as it came over, Ferguson held his corner and McGinnis let loose, and his corner swung that way, and the next I saw McGinnis fell off the car. I suppose the car must have fallen on his foot, but he said not, that it was just the jar of the ground that hurt his feet. Q. After you and Kincade raised the car up, what was the duty of the men on the other side as to letting it down? A. Take it and let it down so as to not let it fall. Q. After you and Kincade raised it up, there was nothing for you to do? A. No, Sir; that was our part of the work. Two men to raise it up and two to let it down. Q. After you raised it up, did you shove the car at all? A. No, sir. Q. You did not? A. No, sir; not after it was perpendicular. Q. Did you simply raise the car up? A. Yes, sir." Defendant's testimony further showed that there were no directions by defendant Welsh to plaintiff. The foregoing sufficiently sets out the evidence for a disposition of this case as we see the law.

From the negligence pleaded and the proof made, the railway company, if liable at all, is liable upon the principle of respondeat superior. There are two classes of cases falling under this doctrine, one wherein the master is held liable for the non-feasance or negligent failure of the servant to perform a duty, and the other where the master is held liable for the misfeasance, or negligent performance of a duty. In the one case the servant simply negligently fails to do what should have been done, and in the other he negligently does what should have been done and properly done. In the first class of cases the servant is not liable to third parties, but the master under the rule of respondeat superior is liable. In the second class both are liable to third parties; the servant because he actually does the wrongful act occasioning the injury, the master because, under the rule of respondeat superior, he is liable for the negligent act of the agent done within the scope of his employment, and in the course and performance of his master's business. In either case the master has recourse upon the servant as for

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breach of duty to the master. The case at bar is one for misfeasance, or one of the second class as above classified. Counsel for plaintiff evidently so understood it, or there would have been no joinder of the servant. But whether he did so understand and so act is immaterial, for the evidence so shows. "We have quoted at length from the evidence, for the reason that in the brief counsel for plaintiff undertakes to argue that the act of French in lifting and pushing the rubble car in the way he did was misfeasance, but his act in failing to assist in letting down the car was nonfeasance. This will not do. The thing to be done was to turn over a rubble car. French participated in that work, and, if he was guilty of negligence in doing the work, it was misfeasance." By the verdict of the jury French was found not guilty of negligence, and appellant claims, and we think rightfully, that, if French is adjudged not guilty of the charge of negligence, it likewise stands discharged. If defendant is liable at all under the pleadings and evidence, it is liable by reason of negligence of French, and not otherwise. It is a travesty upon the law to say that French has been guilty of no negligence in this case, and by the same verdict and judgment say the defendant is guilty of negligence, though French, its servant, for which it is liable and should pay damages. Here were these men in the performance of a duty, that of loading their tools upon a car, which the evidence showed occurred every time they moved from one place to another, and that was every two or three days. The work to be done was lawful work, and work in the regular course of employment.

There are two parallel cases by the Supreme Court of Washington, wherein, in our judgment, the true rule is announced. In case of *Doremus v. Root et al.*, 23 Wash., loc. cit. 715, 63 Pac. 574, 54 L. R. A. 649, the court says: "Joint tort-feasors are liable to the injured person (other than that he may have but one satisfaction) as if the act causing the injury was the separate act of each of them, and they have, except in certain special cases, no right of contribution among themselves. But the defendants in this character of action are in no sense joint tort-feasors, nor does their liability to the plaintiff rest upon the same or like grounds. The act of an employee even in legal intendment is not the act of his employer, unless the employer either previously directs the act to be done or subsequently ratifies it. For injuries caused by the negligent act of an employee not directed or ratified by the employer, the employee is liable because he committed the act which caused the injury, while the employer is liable, not as if the act was done by himself, but because of the doctrine of respondeat superior, the rule of law which holds the master responsible for the negligent act of his servant, committed while the servant is acting within the general scope of his employment and engaged in his master's business. The primary liability to answer for such an act, therefore, rests upon the employee, and, when the employer is

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compelled to answer in damages therefor, he can recover over against the employee. *Oceanic Steamer Nav. Co. v. Compania Transatlantica Española*, 134 N. Y. 461, 31 N. E. 987, 30 Am. St. Rep. 685, note to *Village of Cartersville v. Cook*, 16 Am. St. Rep. 248; 1 *Shearman & Redfield, Negligence* (5th Ed.) par. 242; 2 *Van Fleet, Former Adjudication*, p. 1162." Again, on page 716 of 23 Wash., page 574 of 63 Pac. (54 L. R. A. 649) Fullerton, J., in that case, further says: "So, also, in such an action, whether brought against the employer severally or jointly with the employee, the gravamen of the charge is, and must be, the negligence of the employee, and no recovery can be had unless it be proved, and found by the jury, that the employee was negligent. Stated in another way, if the employee who causes the injury is free from liability therefor, his employer must also be free from liability. This was held in *New Orleans & N. E. R. R. Co. v. Jopes*, 142 U. S. 18, 12 Sup. Ct. 109, 35 L. Ed. 919." In the *Doremus Case*, *supra*, the verdict was against defendant railway company, but said nothing as to defendant Root. By the judgment Root, a conductor of the railway company, was exonerated of negligence, and the railroad company found liable, and it appealed. As in the case at bar, the plaintiff did not appeal from the judgment in favor of Root. The court reversed the judgment and remanded the case, with directions to the lower court to enter judgment for the defendant. In case of *Stevick v. Northern Pacific R. Co. et al.*, 39 Wash., loc. cit. 506, 81 Pac. 1001, the court through Mount, C. J., says: "The only negligence alleged or attempted to be proven was that the engine was out of repair and was leaking steam, and that Gregg, the agent of the company, had notice to repair it. The defendant Gregg was joined in the action by reason of the fact that he was the master mechanic in charge of the engine, knew its condition, and, it is alleged, neglected to make the necessary repairs. The fact was admitted that the defendant Gregg was the master mechanic in charge of the engine, and that it was his duty to keep it in repair. When the jury found that defendant Gregg was not negligent, then it necessarily followed that the railway company was not negligent, because the negligence of the railway company, as stated in the complaint, is based upon the negligence of Gregg. It is true that the complaint states 'that' defendants, and both of them, negligently failed to repair said locomotive,' but the complaint, taken as a whole, shows that the negligence of the company is based entirely upon the alleged negligence of its servant Gregg in charge of its locomotives. The jury, having found that defendant Gregg was not negligent, and having returned a verdict in his favor, necessarily exonerated the railway company. *Doremus v. Root*, 23 Wash. 719, 63 Pac. 572, 54 L. R. A. 649." In this case the verdict was practically in form of the verdict in case at bar. It found for the defendant Gregg, the employee, and against the

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railway company. The court reversed the judgment and ordered the action dismissed.

In our state, in case of *Delaplain v. Kansas City et al.*, 109 Mo. App., loc. cit. 113, 83 S. W. 72, the Kansas City Court of Appeals has touched upon the question herein involved. The city and its contractor had been sued for negligence. The negligence was that of the contractor. Plaintiff had judgment, and the lower court set aside the judgment for alleged errors in the instructions and refusal of instructions. The trial court had refused an instruction asked by Walsh, the contractor, directing a separate finding as to the two defendants. Upon this point Broadus, J., says: "But we cannot agree with the trial court that there was error in refusing to give defendant Walsh's instruction that the jury might find separately as to him. The city could not have been liable under the proof unless the defendant Walsh had been guilty of negligence on his part." Because of the rule we here announce, it is generally held that, where the action is one involving the doctrine of respondeat superior, a judgment in separate actions acquitting the servant bars the action against the master and vice versa. We are cited by respondent to the case of *Berkson v. Kansas City Cable Ry. Co.*, 144 Mo. 211, 45 S. W. 1119. That case does not conflict with the views herein expressed. In the case at bar every element of negligence was eliminated from the case by plaintiff's testimony, except the alleged negligence of the servant French. This negligence consisted of negligently performing a duty in the doing of a lawful act. It is a case where the master is entitled to contribution from the servant. The Berkson Case is not in this case. It is one of joint tort-feasors, pure and simple, and in which there is no right to contribution. The court puts it upon that ground. On page 217 of 144 Mo., page 1120 of 45 S. W., it is said: "If the jury found that the cable car company was guilty of a tort in the nature of a trespass in entering upon and changing the grade of the street in front of plaintiff's property, it was liable for the entire amount of damages caused by its act, without reference to the question as to who else or how many others participated in the same wrong. Between joint wrongdoers no right of contribution exists; that one cannot be heard to complain that all guilty of the wrong have not been included in the same action or included in one common judgment rendered as the result of its prosecution." The action in the Berkson Case was in the nature of a trespass, a pure tort, and a trespass which was directed to be committed by the railway company.

We are firmly of the opinion that in cases where the right to recover is dependent solely upon the doctrine of respondeat superior, and there is a finding that the servant, through whose negligence the master is attempted to be held liable, has not been negligent, as was true in the case in hand, there should be no judgment against the master. The verdict in this case is a

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monstrosity. The jury say French was guilty of no negligence, yet, in the same breath, say the company was guilty of negligence, although nothing further was done by the company than what it did through French, its servant. Such a verdict is wrong. It is inconsistent and unreasonable. The conclusion reached upon this proposition renders further inquiry as to other questions unnecessary.

French has been acquitted of the charge of negligence. Plaintiff takes no further action as to him by way of appeal or otherwise. The case falls strictly within the case in 39 Wash. 501, 81 Pac. 999.

From the foregoing conclusions it follows that the judgment should be reversed, and it is so ordered. All concur.

BAKER et al. v. TACOMA EASTERN RY. CO.

(Supreme Court of Washington, Dec. 6, 1906.)

[87 Pac. Rep. 826.]

Railroads—Crossing Accident—Negligence—Proximate Cause.*—

Where decedent stepped onto a railroad track at a crossing without looking or listening and was struck and killed, the negligence of the railroad company in backing the train without providing a brakeman or lookout on the rear car, was not the proximate cause of his death.

Same—Contributory Negligence.†—Decedent, a man of experience 49 years old, was struck and killed while crossing a railroad track at a crossing, by a train being backed over the crossing without a lookout on the rear car. The locality comprised a network of tracks crossing the street at different points, and, at the time of the accident, engines were passing and repassing thereon making noise incident thereto. The train by which decedent was struck was obscured by steam emitted from other engines and he stepped on the track without looking or listening. Held, that decedent was guilty of contributory negligence as a matter of law precluding a recovery for his death.

Same—Gross Negligence—Malice.‡—That defendant railroad company backed a logging train over a crossing at high speed without

*For the authorities in this series on the subject of the combined effect of negligence and contributory negligence, in actions for injuries sustained at railroad crossings, see foot-notes appended to *Dryden v. Pennsylvania R. Co.* (Pa.), 19 R. R. R. 168, 42 Am. & Eng. R. Cas., N. S., 168; *Foult v. Wilmington City Ry. Co.* (Del. Supr. Ct.), 19 R. R. R. 541, 42 Am. & Eng. R. Cas., N. S., 541; *Stokes v. Southern Ry. Co.* (Va.), 18 R. R. R. 731, 41 Am. & Eng. R. Cas., N. S., 731.

†For the authorities in this series on the subject of the care required of a highway traveler at a railroad crossing where his view of approaching trains is obstructed, see foot-notes appended to *Bartlett v. Worcester Consol. St. R. Co.* (Mass.), 20 R. R. R. 267, 43 Am. & Eng. R. Cas., N. S., 267; foot-note appended to *State v. Western Maryland R. Co.* (Md.), 19 R. R. R. 830, 42 Am. & Eng. R. Cas., N. S., 830; *Bilton v. Southern Pac. Co.* (Cal.), 19 R. R. R. 797, 42 Am. & Eng. R. Cas., N. S., 797; foot-notes appended to *Louisville & N. R. Co. v. Crominary* (Miss.), 18 R. R. R. 513, 41 Am. & Eng. R. Cas., N. S., 513.

‡For definitions of gross negligence, see foot-note appended to

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any lookout or brakeman on the rear car to warn pedestrians of the danger, did not constitute such gross negligence as to amount to maliciousness so as to justify a recovery for death of plaintiff's decedent by being struck by the train at the crossing, independent of decedent's contributory negligence.

Appeal from Superior Court, Pierce County; W. H. Snell, Judge.

Action by Julia A. Baker and others against the Tacoma Eastern Railway Company. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Govnor Teats and William P. Reynolds, for appellants.
Shackleford & Hayden, for respondent.

DUNBAR, J. Joseph Baker was run over and killed on the morning of July 28, 1905, on East D street in the city of Tacoma, where the Northern Pacific railway tracks cross the same, by a long Tacoma Eastern Railway train loaded with logs, backing down upon him, without any lookout or rear brakeman upon the train to protect the people passing along the street. The plaintiffs, wife and daughter of the deceased, sued to recover for the wrongful death.

The complaint alleged negligence on the part of the respondent in not having a guard upon the rear end of the train. It appears from the complaint that East D street is one of the thoroughfares over which many people pass, and especially so at the hour of 7 o'clock in the morning, which was the time this accident occurred, as it is the street leading from their homes to the numerous factories, railroad shops, and mills, upon the tide flats; that the Northern Pacific tracks, consisting of about seven or eight tracks, cross East D street at about right angles, and its roundhouse is located near East D street; that, at the time of the accident, Northern Pacific engines were coming out of the roundhouse, going up East D street on the several tracks two or three at a time, puffing, ringing bells, and blowing off steam; that the defendant, at the time of the accident, was running or backing its train of about nine cars, with great speed, over one of the parallel tracks across said East D street, with a locomotive upon the rear end of the train which the defendant was backing. Baker was an employee of the Northern Pacific Railway Company at its roundhouse just east of D street. The Tacoma Eastern Railway Company has a depot just west of D street, about a block to the south of the railroad track, and its tracks are so arranged as to connect with the Northern Pacific tracks, and to switch back and forth upon them and across East D street, down to the city waterway where it unloads its train loads of logs. It appears that while the engines were

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ringing their bells and blowing off large quantities of steam, and when one of the engines of the Northern Pacific was on the track in front of him, and another had passed up along towards the west, probably 50 or 60 feet, and another engine was coming towards him, and other engines were on the tracks in the immediate vicinity, Mr. Baker came diagonally across the street crossing, his attention riveted upon the engines which were coming towards him; that, at the time he was crossing the track upon which he was killed, he had his back towards the west, or his left side and back towards the west as he went in the diagonal direction, when the logging train backed on him, and threw him down onto the south rail of the track, and ran over and killed him. Negligence was denied by the defendant, and contributory negligence alleged. After the issues were made up, it was stipulated that a statement of the case by the plaintiffs should be made, and that the court should then pass upon the right of the plaintiffs to recover. After such statement was made, construing the statement of the plaintiffs and the pleadings, the court found that the plaintiffs were not entitled to recover, and dismissed the action. From this judgment of dismissal this appeal is taken.

The statement is quite lengthy, but we think we have said sufficient to present the situation fairly. It is the contention of the appellants that it was negligence on the part of the respondent, under the circumstances, as shown by the complaint and the statements, to back its cars down across a street where pedestrians were crossing in great numbers, without a lookout or brakeman on the rear end of the cars. Conceding, for the purposes of this decision, that it was negligence for the railroad company to back the train across the street without a watchman, yet we think the appellants cannot recover, for the reason that such negligence was not the proximate cause of the accident, but that the proximate cause was the contributory negligence of the deceased. It is the contention of the appellants that this case is controlled by the decision of this court, in *Roth v. Union Depot Co.*, 13 Wash. 525, 43 Pac. 641, 44 Pac. 253, 31 L. R. A. 855, and *Steele v. Northern Pacific Ry. Co.*, 21 Wash. 287, 57 Pac. 820. But we think to allow a recovery in this case we would have to extend the doctrine announced in those cases. In both cases the cars were sent down the track without any one attending them at all, and this court held that to be negligence. But in both cases the injured persons were boys of tender years, and it was held that the same degree of caution would not be demanded of them as would be demanded of an adult. In *Roth v. Union Depot Co.*, supra, it was said: "By the overwhelming weight of authority a distinction is made between the responsibility of a child and that of an adult. It seems to us that it would be a monstrous doctrine to hold that a child of inexperience—and experience can only come with years—should be held to the same degree of care in avoiding danger as a person of mature

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years and accumulated experience. In the simplest transactions of life we recognize this distinction." And this sentiment was approved in the Steele Case. But, in this case, the person injured was a man of age and experience, being 49 years old, not only experienced in the general affairs of life, but experienced in the business of railroading, experienced in the usual conduct and management of cars at the identical place at which he received the injury, having been in the employ of the railroad company at this place and working in this yard for — years, and crossing this track every day during that time. The locality was a network of tracks crossing the street at different points. Engines were passing and repassing on these tracks, shrieking and rumbling, ringing bells, and puffing steam, which must have necessarily given notice that it was dangerous to cross any track in that network without exercising the utmost prudence, caution, and alertness. It was the duty of the deceased before crossing the track, which is a notice of danger to look and listen.

It is contended by the appellants that the doctrine of look and listen does not apply to a railroad crossing on a street, but, we think, in accordance with the opinion of the lower court, that, if there was any place where it would seem that the doctrine of looking and listening would apply, it would be just such a place, where there were so many engines and trains passing over the tracks in different directions, and so many switches throwing the trains from one track back and forth to another. It would be hard to conceive of a case of negligence in crossing a railroad track without due precaution, if this case does not furnish an instance of negligence. It is claimed that the deceased could not see the logging train approaching him by reason of the abundance of steam emitted from other engines. But, in addition to the fact that this was a warning to him not to step on the track until he could see, or determine the safety of the place in some other way, the employment of a watchman on the end of the train would have been unavailing, for the watchman could not have seen him. A discussion of cases would be unprofitable in the decision of this case, for every case presents a little different state of facts. But this court has accepted the doctrine announced by the Supreme Court of the United States, in *Chicago, R. I. & P. R. R. Co. v. Houston*, 95 U. S. 697, 24 L. Ed. 542, where it was said: "Before attempting to cross a railroad track, he is bound to use his senses, to listen and to look, in order to avoid any possible accident from an approaching train. If he omits to use them, and walks thoughtlessly upon the track, or if, using them, he sees the train coming, and, instead of waiting for it to pass, undertakes to cross the track, and in either case receives any injury, he so far contributes to it as to deprive him of any right to complain." It was said by this court in *Woolf v. Washington Ry. & Nav. Co.*, 37 Wash. 491, 79 Pac. 997: "The argument that contributory negligence

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involves the question of what an ordinarily prudent man would do under all the circumstances, and consequently presents a question solely for the jury, is, when applied to the case at bar, unsound in this: In railroad crossing cases the law has prescribed 'looking and listening' as precautions essential to 'ordinary care' or 'ordinary prudence.' Hence, as a matter of law, a man crossing a railroad track without 'looking and listening' cannot be held guiltless of negligence, except in rare cases, and under extraordinary conditions. * * *

Under all the circumstances of this case, considering both the pleadings and the statement made, we are compelled to the conclusion that the deceased was guilty of contributory negligence, and that the appellants therefore cannot recover. We think that the negligence on the part of the railroad company was not so gross that it could be considered malicious, and that, therefore, the proximate cause of the accident was the negligence of the deceased.

MOUNT, C. J., and RUDKIN, FULLERTON, and HADLEY, JJ., concur. ROOT and CROW, JJ., not sitting.

MCQUADE v. ST. LOUIS & SUBURBAN RY. Co. et al.

(Supreme Court of Missouri, Division No. 1, Nov. 21, 1906.)

[98 S. W. Rep. 552.]

Street Railroads—Injuries to Pedestrian—Action—Pleading—Repugnant Allegations.—In an action against a street railway company for injuries to a pedestrian at a crossing, a petition alleging in one count that the motorman failed to keep a vigilant watch, etc., and also that he failed to stop the car in the shortest time and space possible, was not objectionable as alleging repugnant grounds of negligence.

Pleading—Petition—Review—Allegations—Remedies.—Where a petition is defective as alleging repugnant grounds of negligence in the same count the defect can only be reached by demurrer or motion to elect, and not by a demurrer to the evidence.

Death—Actions—Street Railroads—Negligence of Employees—Statutes—Application.*—Rev. St. 1899, § 2864, providing that, whenever any person shall die from an injury resulting from, or occasioned by, the negligence of any servant or employee while running any car, the corporation in whose employ such servant or employee shall be at the time the injury is committed shall forfeit and pay for every person so dying the sum of \$5,000, is applicable to street railways.

Same—Municipal Ordinances.—Rev. St. 1899, § 2864, creates an action for death resulting from, or occasioned by, the negligence of any servant or employee while running any car, etc. Held, that the

*For the authorities in this series on the question whether street railways are "railroads" within the meaning of statutes, see foot-notes appended to *Egan v. Cheshire St. Ry. Co.* (Conn.), 21 R. R. R. 781, 44 Am. & Eng. R. Cas., N. S., 781; *Little Rock Ry. & Elec. Co. v. Newman* (Ark.), 20 R. R. R. 631, 43 Am. & Eng. R. Cas., N. S., 631; *Licznarski v. Wilmington City Ry. Co.* (Del. Supr. Ct.), 19 R. R. R. 613, 42 Am. & Eng. R. Cas., N. S., 613.

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right of action so given included death from negligence generally, whether consisting of negligence as defined by the common law, or arising from a failure to discharge a duty imposed by statute or municipal ordinance.

Street Railroads—Death of Pedestrian—Vigilant Watch.†—Where, in an action for death of a pedestrian at a street railroad crossing, there was evidence that, by the exercise of ordinary care, the motor-man could have seen deceased on the track in time to have saved his life by the exercise of ordinary care thereafter, plaintiff was entitled to recover, though there was no evidence that, after the motor-man in fact saw the deceased, he could have prevented a collision.

Same—Contributory Negligence—Petition—Construction.—Where a petition, for death of a pedestrian in a collision with a street car, charged certain acts of negligence, and then alleged violations of a city ordinance, "which violations of such ordinance directly contributed to cause the death and injury of plaintiff's husband," the petition should be construed to mean that the violation of the ordinance contributed with the other precedent acts of negligence charged in the petition to cause such injury and death, and not that they contributed with deceased's negligence to cause such injury.

Appeal from St. Louis Circuit Court; Daniel D. Fisher, Judge.

Action by Mary McQuade against the St. Louis & Suburban Railway Company and another. From a judgment in favor of defendants, plaintiff appeals. Reversed and remanded.

A. R. Taylor and Howard Taylor, for appellant.

Jefferson Chandler and T. M. Pierce, for respondents.

BRACE, P. J. This is an action by the widow to recover \$5,000 damages for the death of her husband, Michael McQuade, under the provisions of section 2864, Rev. St. 1899, in which, at the close of the plaintiff's evidence, a demurrer thereto was sustained, the plaintiff took a nonsuit, and, from the refusal of the court to set the same aside, she appeals.

The petition is as follows: "The plaintiff states that she was the lawful wife of Michael McQuade at the time of his death as herein stated; that the defendants are each, and at the times herein stated were each, corporations by virtue of the law of Missouri, and used and operated the railway and car herein mentioned for the purpose of transporting persons for hire from one point to another in the city of St. Louis as a public conveyance in charge of their motorman and conductor; that at said times Wash street and Twenty-Third street, at the places herein stated, were open public streets within the city of St. Louis; that on the 9th day of May, 1901, the plaintiff's husband, Michael McQuade, was lawfully on the crossing of Wash and Twenty-Third streets, at or near the east crossing thereof.

†For the authorities in this series on the subject of the care required of those in charge of street cars to prevent collisions with other users of streets, see foot-notes appended to *Palmer Transfer Co. v. Paducah Ry. & Light Co.* (Ky.), 21 R. R. R. 815, 44 Am. & Eng. R. Cas., N. S., 815; foot-notes appended to *Birmingham, etc., Co. v. Clarke* (Ala.), 21 R. R. R. 618, 44 Am. & Eng. R. Cas., N. S., 618; foot-notes appended to *Jacksonville Electric Co. v. Adams* (Fla.), 20 R. R. R. 295, 43 Am. & Eng. R. Cas., N. S., 295.

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when defendant's servants in charge of their west-bound car carelessly and negligently, and without using any care to give warning of the approach of said car to said crossing or to said Michael McQuade, and without using any care to watch out for persons on said crossing, and without using any care to slow up or stop said car and avert injury to said McQuade, did cause and suffer said car to strike and so injure said McQuade that he died from said injuries at St. Louis on the day aforesaid. And for another and further assignment of negligence the plaintiff avers that at the time of the death of her husband there was in force within the city of St. Louis an ordinance of said city by which it was provided that motormen and conductors of each car should keep a vigilant watch for persons on foot, either on the track or moving towards it, and upon first appearance of danger to such person the car should be stopped within the shortest time and space possible, and the plaintiff avers that at and before the time that said car struck and injured her husband the motorman and conductor of said car were failing to keep such vigilant watch, and failed to stop said car on the first appearance of danger to her husband as he moved towards said track and was upon said track, which violation of said ordinance directly contributed to cause the injury and death of plaintiff's husband; that by the death of her husband caused as aforesaid an action has accrued to the plaintiff to sue for and recover the sum of \$5,000 according to the statute of Missouri. And the plaintiff avers that within six months after the death of her husband she instituted an action against the St. Louis & Suburban Railway Company, one of the defendants herein, to recover said statutory damages for the death of her said husband, and thus appropriated said cause of action to herself, which action was dismissed. The answer was a general denial and a plea of contributory negligence, on which issue was joined by reply. The case made by the plaintiff's evidence is substantially as follows: Wash street runs east and west; Twenty-Third street north and south. On Wash street there are two tracks on which defendants run their cars. West-bound cars run on the north track and east-bound cars on the south track. On the 9th of May, 1901, the plaintiff's husband, Michael McQuade, walked south on the east sidewalk of Twenty-Third street to the east crossing of that street over Wash street. When he reached the crossing two cars were approaching the crossing, one from the east and one from the west. He stopped at this crossing until the west-bound car on the north track passed, and then proceeded to cross the street, stopped on the north track, over which the west-bound car had just passed, until the east-bound car passed on the south track, and, as he was in the act of stepping off the north track, he was struck by another west-bound car and killed. When the deceased stopped on the north track to let the east-bound car go by, the second west-bound car by which he was struck was

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distant from him 160 feet. The car was going at a speed of about 15 miles an hour, no bell was rung or gong sounded, and no effort was made to check the car or avoid the collision until the car was within 15 or 20 feet of the deceased, when such effort was made, but too late to avert the catastrophe, as the car ran 25 or 30 feet after the collision. The car that killed the deceased was either a Suburban car or a Meramec river car, but there is a conflict in the evidence as to which company the car belonged. This suit was instituted in the St. Louis City circuit court on the 8th day of May, 1902. Prior thereto, to wit, on the 15th of July, 1901, a suit on the same cause of action was instituted in said court by the plaintiff against the defendant, the St. Louis & Suburban Railway Company, which suit was, on the 8th day of May, 1902, dismissed.

1. It does not appear from the record upon what ground the trial court sustained the demurrer to the plaintiff's evidence, but it is contended for the defendant that the demurrer was properly sustained for several reasons which will be noticed in their order. It is first contended that the alleged grounds of negligence are repugnant in that the first ground is that the motorman failed to keep a vigilant watch, etc.; and, second, that he failed to stop said car in the shortest time and space, etc.; that the former is an affirmative and the latter a negative wrong, and that they cannot be "yoked up in the same petition." We are unable to appreciate the force of the argument by which it is attempted to support this proposition. The duty of the motorman to the deceased to be on the watch, and to stop, if at all, arose from the situation in which the deceased was as the car was approaching the crossing, and the one was as much a positive duty as the other—each was consistent with the other. If, by failure to be on the watch, the motorman failed to discover the perilous position of the defendant when he could have done so by the exercise of ordinary care, he was guilty of negligence; or if, being on the watch, he did discover his perilous position and failed to stop his car when, by the exercise of ordinary care, he could have done so, he was guilty of negligence; and there is no good reason why both acts of negligence should not have been charged in one count of the petition. Moreover, if even the petition was defective in this respect, such defect could not be reached by a demurrer to the evidence; it could only be reached by demurrer to the petition, or a motion to elect.

2. It is next contended that section 2864 of the statute under which this action was brought is not applicable to street railroads. This contention was made in the case of *Higgins v. St. Louis Suburban Railway Company*, ably argued by the same counsel for defendant, and held to be untenable in an opinion handed down by Graves, J., June 19, 1906 (95 S. W. 863), not yet officially reported, in which, on this point, all the judges of this division concurred. After further consideration of the

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question, we are all entirely satisfied with the conclusion reached in that case, and hold in this, as we did in that case, and for the reasons therein stated, that said section is applicable to street railroads.

3. It is next contended that, although section 2864 applies to street railroads, the ground of recovery by a person not a passenger is confined to common-law negligence, and does not extend to an injury from a failure to discharge a duty imposed by municipal ordinance. We find no such limitation in the statute. As applicable to this case, the statute reads: "Whenever any person shall die from any injury resulting from or occasioned by the negligence of * * * any officer, agent, servant or employee whilst running any * * * car, * * * the corporation * * * in whose employ any such officer, agent, servant, employee * * * shall be, at the time such injury is committed, * * * shall forfeit and pay for every person * * * so dying the sum of five thousand dollars." The right of action given by the statute is for negligence; not for negligence as defined by the common law, but as well for negligence that may arise from a failure to discharge a duty imposed by statute or municipal ordinance. The statute makes no distinction, and we can make none. It contains no such limitation as is contended for, and we cannot put such a limitation upon its comprehensive terms.

4. It appears from the evidence that Michall McQuade, beside his widow, left surviving him a minor child, and this suit, although brought within a year, was not brought within six months after his death; therefore, it is contended, the demurrer was properly sustained. But it also appears that, within six months after her husband's death, the plaintiff did bring her suit therefor against one of the defendants, and, within a year after his death, dismissed the same and brought this suit against both of the defendants, and it was expressly held in *Packard v. Railroad*, 181 Mo. 421, 80 S. W. 951, 103 Am. St. Rep. 607, "that, where a widow has brought a suit for the death of her husband within six months after his death, she can, if she has suffered nonsuit or dismissed the suit, within one year after his death, renew the suit against the same party or bring it against another wrongdoer or both." This ruling is in harmony with the previous rulings on the subject—*Barker v. Hannibal & St. Jo. R. R. Co.*, 91 Mo. 86, 14 S. W. 280; *McNamara v. Slavens*, 76 Mo. 329; *Shepard v. St. L., I. M. & S. Ry. Co.*, 3 Mo. App. 550—and this contention must be ruled against the defendants.

5. It is next contended that the demurrer to the evidence was properly sustained because there was no evidence that, after the motorman saw the deceased, he could have saved his life. But there was evidence tending to prove that, by the exercise of ordinary care, the motorman could have seen the deceased on the track in time to have saved his life by the exercise of ordi-

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nary care thereafter, and in such case it is settled law in this state that the plaintiff may recover. *Scullin v. Railroad*, 184 Mo. 707, 83 S. W. 760; *Klockenbrink v. Railroad*, 172 Mo. 678, 72 S. W. 900; *Morgan v. Railroad*, 159 Mo. 262, 60 S. W. 195; *Kellny v. Railroad*, 101 Mo. 67, 13 S. W. 806, 8 L. R. A. 783; *Hilz v. Railroad*, 101 Mo. 36, 13 S. W. 946, and many others, in these cases cited.

6. It is next and finally contended that the demurrer to the evidence was properly sustained because the petition only charges the defendant with contributory negligence. The only basis for this contention is the allegation in the petition, "which violations of said ordinance directly contributed to cause the death and injury of the plaintiff's husband," which counsel would have us interpret to mean "which violations," etc., "contributed" with the negligence of the deceased "to cause the injury," etc. It will not fairly bear such an interpretation. The evident meaning of the pleader was that the violation of the ordinance contributed, with the other precedent acts of negligence charged in the petition, "to cause the injury and death of plaintiff's husband."

Counsel, after a labored effort, have failed to point out, and we have failed to discover, any good reason in the record why the case should have been taken from the jury. The judgment of the circuit court will therefore be reversed, and the cause remanded, with directions to set aside the nonsuit and grant the plaintiff a new trial.

LAMM, J., concurs. VALLIANT, J., concurs in all except the fourth paragraph. GRAVES, J., concurs in the result.

PETERSON v. ST. LOUIS TRANSIT CO.

(Supreme Court of Missouri, Division No. 1, Nov. 21, 1906.)

[97 S. W. Rep. 860.]

Street Railroads—Operation of Cars on Streets—Care Required.*—

It is the duty of a street railway company to run its cars at a rate of speed not to exceed the maximum speed fixed by a municipal ordinance, and to keep vigilant watch for all vehicles or persons either on or moving towards the track, and, on the first appearance of danger, to stop the car in the shortest time possible.

Same—Care Required of Traveler.†—A traveler has a right to as-

*See preceding case, and foot-notes.

†For the authorities in this series on the subject of the care required of those driving other vehicles in streets upon which street cars are operated, see foot-notes appended to *Birmingham, etc., Co. v. Clarke* (Ala.), 21 R. R. R. 618, 44 Am. & Eng. R. Cas., N. S., 618; foot-notes appended to *Kannenbergh v. Conestoga Traction Co.* (Pa.), 21 R. R. R. 80, 44 Am. & Eng. R. Cas., N. S., 80; foot-notes appended to *Indianapolis St. Ry. Co. v. Marschke* (Ind.), 20 R. R. R. 609, 43 Am. & Eng. R. Cas., N. S., 609; *Timler v. Philadelphia Rapid Transit Co.* (Pa.), 20 R. R. R. 500, 43 Am. & Eng. R. Cas., N. S., 500.

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sume, when about to drive on a street on which a street railway company is operating cars, that the cars are being run thereon in obedience to the ordinances limiting the maximum rate of speed, and that the servants in charge of the cars are keeping a vigilant watch for vehicles and persons on or moving towards the track, and will, on the first appearance of danger, stop the car in the shortest time possible.

Same—Injury to Traveler—Contributory Negligence—Question for Jury.—In an action against a street railway company for injuries to a traveler in a collision with a street car, evidence examined, and held, that the question of the traveler's negligence was for the jury.

Same—Negligence—Question for Jury.—In an action against a street railway company for injuries to a traveler in a collision with a street car, evidence examined, and held, that the question of the company's negligence was for the jury.

Negligence—Imputed Negligence.†—A boy 16 years of age was in a vehicle drawn by a horse driven by his uncle. The boy had no control over the movement of the vehicle. Held, that the negligence of the driver, causing a collision with a street car, was not imputable to the boy.

Appeal—Errors in Instructions—Right to Complain.—The court, at the instance of a party, gave 10 instructions, and, at the instance of the adverse party, it gave 17 instructions. The adverse party also asked for 3 instructions which were refused. Held, that the adverse party could not complain on account of the multitude of the instructions.

Same.—A party cannot urge that the court modified his request instructions where no modifications appear in his abstract.

Same—Errors in Instructions—Harmless Error.—Under Rev. St. 1899, §§ 659, 865, providing that no judgment shall be reversed by reason of errors not affecting the substantial rights of the party complaining, where a verdict is for the right party the Supreme Court will not reverse the judgment for errors in the instructions.

Trial—Verdict—Signature of Jurors—Sufficiency.—A verdict was signed by nine jurors. The first juror who signed his name attached thereto the word "foreman." Held, that the verdict was sufficient.

Appeal from Circuit Court, Cole County; Jas. E. Hazell, Judge.

Action by Hans Christian Peterson against the St. Louis Transit Company. From a judgment for plaintiff, defendant appeals. Affirmed.

Boyle & Priest and Morton Jourdan, for appellant.

Richard F. Ralph and Barclay, Shields & Fauntleroy, for respondent.

BRACE, P. J. This is an action for damages for personal injuries in which the plaintiff obtained judgment below for \$5,000, and the defendant appeals.

About 11 o'clock on the morning of the 29th of December, 1901, the plaintiff, then a minor aged about 16 years, was in a

†For the authorities in this series on the subject of imputed negligence, see foot-notes appended to *Kane v. Boston Elev. Ry. Co.* (Mass.), 20 R. R. R. 581, 43 Am. & Eng. R. Cas., N. S., 581; foot-notes appended to *Bresee v. Los Angeles Traction Co.* (Cal.), 20 R. R. R. 537, 43 Am. & Eng. R. Cas., N. S., 537; foot-notes appended to *Jacksonville Electric Co. v. Adams* (Fla.), 20 R. R. R. 295, 43 Am. & Eng. R. Cas., N. S., 295.

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close-covered storm buggy, drawn by one horse, driven by his uncle, Ole Peterson, going in an easterly direction on Clark avenue between Twenty-First and Twenty-Second streets, in the city of St. Louis, when the buggy was run into and struck from behind by one of defendant's cars, going in the same direction, causing the horse to run away and throw the plaintiff upon a pile of rocks on the sidewalk in Twenty-First street, whereby his skull was fractured, the right eye so injured as to destroy its vision, and he was otherwise injured. The petition alleges that his injuries were caused by the negligence of the defendant's servants in charge of the car. The specific acts of negligence charged are, in substance, a breach of the vigilant watch and speed ordinances, a reckless and unlawful rate of speed, failure to give any warning signals, and to exercise ordinary care to prevent the collision. The answer was a general denial with a plea of contributory negligence, upon which issue was joined by reply. At the close of the plaintiff's evidence, the defendant demurred thereto, and, upon the demurrer being overruled, introduced its evidence in defense, and, at the close of all the evidence, renewed its demurrer. The first question presented for determination is whether, upon all the evidence, the court erred in submitting the case to the jury.

1. The evidence for the plaintiff tended to prove that he was a young Dane who had been in this country only about three months, who could not speak the English language and had to be examined through an interpreter; that the buggy and horse were owned and being driven by his uncle, Ole Peterson, a citizen of mature years doing business on Clark avenue; that Clark avenue is a narrow street running east and west, about 30 feet wide between the sidewalks; that defendant had a single track in the center of the street occupying a space of about 6 feet of its width, and leaving a space of about 12 feet on either side; that on its track cars were run but one way, from west to east; that Twenty-First, Twenty-Second, and Twenty-Third streets run north and south crossing Carr avenue at right angles in a densely populated part of the city; that the width of these streets is between 50 and 60 feet, and the length of the blocks on the avenue between them is about 300 feet; that Ole Peterson drove his buggy south on Twenty-Second street to its intersection with Clark avenue, looked west, as did his nephew, the plaintiff, and, seeing no approaching car within the distance of a block, turned east on Clark avenue and drove down that street in a walk or slow trot close to the north rail of the track, and as he was in the act of crossing the track diagonally some 40 or 50 feet east of the crossing the horse and buggy were struck by defendant's car going east which ran about 100 feet further before it stopped; that neither the plaintiff nor his uncle looked back behind them for an approaching car after they turned east on Clark avenue; that the maximum rate of speed prescribed for street cars was 8 miles per hour; that the

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car was going at a speed of 30 or 40 miles an hour; that no bell was rung, gong sounded, nor any other warning of its approach given. The evidence for the defendant tended to prove that the car was going at a speed of from 6 to 12 miles an hour and that the bell was being rung as the car approached Twenty-Second street; that the track was straight, and an approaching car going east could be seen at a distance of from six to eight blocks. The motorman, a witness for the defendant, testified that he first noticed the horse and buggy just after he crossed Twenty-Third street going east; the buggy was turned east from Twenty-Second street on Clark avenue, and was between the track and sidewalk, the horse going on a trot or walk; that the car was running at the rate of 20 miles an hour; that, as soon as the buggy came in sight, he began to slow down by applying the brake, thinking the driver intended to cross the track, and when at the crossing of Twenty-Second street he was running "probably 6, 7, or 8 miles" an hour; that, at the speed he was then going, the car could have been stopped in from 10 to 15 feet; that he noticed that the buggy was on the track in front of his car some 25 or 30 feet distant when he was on Twenty-Second street about east of the crossing; that he gave the brake another turn, but rang no bell, and did not reverse until within three or four feet of the buggy, and the car did not stop after the collision until it ran about 90 feet.

It is contended for the defendant that the demurrer to the evidence ought to have been sustained, because the occupants of the buggy, when it reached Clark avenue, by looking west on that street, could have seen a car approaching for a distance of six or seven blocks, and, as they did not look that far west for an approaching car, but only as far as a block, and, seeing no approaching car, entered upon that street, they were guilty of negligence; and because, after they entered upon the street and were driving diagonally across it some 40 or 50 feet beyond the crossing, they did not look behind them for an approaching car before the buggy went on the track, they were guilty of negligence. The law imposed the duty upon the defendant's servants in running its cars upon Clark avenue to run them at a rate of speed not to exceed eight miles per hour, and to keep a vigilant watch for all vehicles and persons either on the track or moving towards it, and, on the first appearance of danger, to stop the car in the shortest time and space possible. Ole Peterson, a citizen of St. Louis, and for many years a resident thereof, had a right to assume, when about to drive onto Clark avenue at the Twenty-Second street crossing, that defendant's cars were being run thereon in obedience to these legal requirements, and, when he looked to the west, the only direction from which a car was to be expected, and saw no car approaching within a block, there was no apparent danger in driving onto the street, turning to the east and pursuing his way along the street, and he was guilty of no negligence in so doing. In

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turning into the space between the curb of the sidewalk and the north rail of the track, the head of his horse must have been very near that rail and the whole outfit in plain view of the motorman, whose duty it was to be on the lookout for a vehicle in that situation. Thereafter the movement of the vehicle was in front of the car and toward the track in plain view of the motorman until it was struck, about 50 feet from the crossing. The motorman admits that he saw the vehicle when he was at the Twenty-Third street crossing. It was then in front of him at the Twenty-Second street crossing and distant from him about 300 feet, moving as indicated. He admits that he was then running at a speed of 20 miles an hour, but, seeing the situation of the vehicle, applied the brake, and when he reached the Twenty-Second street crossing the car was going only six, seven, or eight miles an hour; that he did not ring the bell when he saw the buggy coming towards the track, but, when about east of Twenty-Second street crossing, noticing that the buggy was on the track ahead about 25 or 30 feet from the car, he gave the brake another turn, and, when within three or four feet of it and when the collision was inevitable, reversed the power, and this was all he did to prevent it, although, according to his own testimony, he ought to have stopped the car at the speed he was going within a space of 10 or 15 feet. We know of no inexorable rule of law that requires a traveler in a closed vehicle going along a public street of a city on which a street railroad track is laid to look behind him for an approaching car, of which he has no warning and of the proximity of which he has no knowledge, every time his horse or vehicle may be about to go on, along, or across the rails of the track. Whether he has been guilty of negligence in going on or over those rails in such case is a question to be determined by the jury under all the circumstances of the case. But, conceding that Ole Peterson was negligent in permitting his horse and buggy to go upon the rails, without looking behind for an approaching car, and leaving out of view all the evidence of the plaintiff's witnesses of the unlawful and reckless speed at which they testified the car was running, still, according to the testimony of the motorman, the defendant's own witness, the car ought to have been stopped in time to have prevented the collision, after he discovered the perilous position in which the vehicle was. His evidence tended to prove that he could have stopped the car and prevented the collision by the exercise of proper care after he discovered the perilous position in which the vehicle was. And this, of itself, was sufficient to take the case to the jury, even if Ole Peterson had been the plaintiff in the case. *Rapp v. Transit Co.*, 190 Mo. 144, 88 S. W. 865, and cases cited on page 161. But he was not, and the status of the plaintiff in the buggy was not that of his uncle. He was a mere passenger in the buggy, exercising no control whatever over its management or movements, and having no right or power to do so, and, upon

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a principle well recognized in this state, the negligence of Ole Peterson, if any, could not be attributed to him, for, as we have said, it is against both reason and authority that an innocent person should be made responsible for the wrong act of another over whom he has, and exercises, no control, and who is neither his servant nor his agent. *Becke v. Mo. Pac. Ry. Co.*, 102 Mo. 544, 13 S. W. 1053, 9 L. R. A. 157; *Sluder v. Transit Co.*, 189 Mo. 107, 88 S. W. 648. The court committed no error in overruling the demurrers to the evidence.

2. The case was submitted to the jury upon 27 instructions, and for the defendant it is contended the judgment ought to be reversed on account of the multitude of the instructions. While it is not specifically stated in the abstract which of these instructions were given at the instance of the plaintiff and which at the instance of the defendant, it does inferentially appear on the face of the instructions and the motion for a new trial that those numbered 1 to 10, inclusive, were given for, and at the instance of, the plaintiff, and those numbered from 11 to 27, inclusive, were given for, and at the instance, of the defendant. Besides these, the defendant asked for three other instructions which were refused. So that, besides the instructions in the nature of demurrers to the evidence, the defendant asked for 20 other instructions, 17 of which were given, and now complains of the multitude of the instructions. It does not lie in its mouth to make such a complaint. The defendant also complains of some of its own instructions on the theory of modification thereof by the court, but no such modifications appear in the abstract and it is in no position to make such a complaint. No complaint is made of the action of the court upon the refused instructions, and the defendant's instructions may be dismissed without further notice. Of the 10 instructions given for the plaintiff, the fourth was a definition of ordinary care, the fifth upon the measure of damages, the sixth upon the burden of proof, the ninth upon the form of the verdict, and the tenth on the credibility of witnesses. We find no substantial error affecting the merits of the case in any of these instructions.

The other instructions upon which the main issue was submitted to the jury are as follows: "(1) The court instructs the jury that it was the duty of the defendant railway company, in operating the car mentioned in evidence in this case on Clark avenue in the city of St. Louis, to exercise ordinary care to avoid coming in contact with the buggy mentioned in evidence when the same was on the track, or in such proximity thereto, as to be in danger of being hit by a car running on defendant's track, and, if you believe and find from the evidence that the collision between the car and the buggy, in which the plaintiff, Hans, was riding, was occasioned by the omission of the motor-man in charge of the movement of defendant's car to use reasonable care to avoid a collision with said buggy, and that,

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because of such want of care, the collision took place, and as a direct consequence thereof the horse attached to said buggy ran away and became unmanageable, and that, as a direct result of said facts, plaintiff, Hans, received the injuries mentioned in evidence, and that the plaintiff, Hans, personally, at and before the events above described, exercised ordinary care to avoid injury, and danger, then your verdict should be for the plaintiff.

(2) The court instructs the jury that, if you believe from the evidence that the buggy was going east along Clark avenue in a course so near the railway track as to be in a position to be hit by defendant's car running on said track, and that the motorman in charge of the movements of said car could, by the exercise of ordinary care on his part, have observed said course of the buggy, and could have stopped or checked said car so as to avoid hitting the buggy, and if you further find from the evidence that said motorman neglected to use such ordinary care to observe said buggy or to check said car so as to avoid hitting the buggy, and that, because of said neglect, the car ran into the buggy and thereby caused the horse to run away and threw plaintiff out of the buggy to his injury, and the plaintiff, Hans, personally used ordinary care to avoid danger and injury at and before said collision and up to the time when he was injured, then your verdict should be for the plaintiff, even although you may believe from the evidence that the driver of the buggy, Ole Peterson, failed or omitted to use ordinary care to notice the approach of the car or to avoid a collision with the car. (3) The court instructs the jury that the plaintiff Hans is not answerable or responsible in this case for any want or omission of care on the part of Ole Peterson in respect to looking or listening for an approaching car, or in respect of the management of the horse or buggy mentioned in the evidence, and, if you believe from the evidence that the plaintiff Hans himself used ordinary care to avoid danger and injury, at and before the collision and up to the time when said plaintiff was injured, then you should find in favor of plaintiff, Hans, on the issue of his alleged negligence." "(7) The court instructs the jury that, if you believe from the evidence that the collision between the defendant's car and the horse or buggy was caused by the negligence—that is to say, the want of ordinary care—on the part of the defendant's agent in charge of the movements of said car, in any of the particulars mentioned in the other instructions, and that said collision caused the horse to run away, and that plaintiff, Hans, was thereafter thrown out of the buggy, without any omission of ordinary care for his own safety, and that he was thrown out and was injured as a natural and direct result of the running away of said horse, and of said collision, then the said injury to plaintiff was a direct consequence or result of said collision, as mentioned in the other instructions. (8) The court instructs the jury that, if they believe from the evidence that, after the buggy or the horse mentioned in the

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evidence was going in a course so near the track as to be within striking distance of the approaching car of the defendant on Clark avenue, the said car was then far enough distant from the said buggy to have been stopped by the motorman in charge of the movements of said car by the exercise of ordinary care on his part in observing said horse and buggy and in the use of the appliances at his command on said car, and that said motorman failed or neglected to use such ordinary care, and, in consequence of said neglect, the car hit the horse or buggy, and that, as a direct consequence of said collision, the horse ran away and the plaintiff, Hans, received the injuries of which he complains, then the jury should find for the plaintiff."

These instructions presented the case very fairly and clearly to the jury, and we fail to find in them any material error prejudicial to the defendant affecting the merits of the case. Although they may not come fully up to the standard of perfection required by the criticism of defendant's learned and ingenious counsel, yet, as, upon the whole of the evidence, the verdict was manifestly for the right party, we cannot for that reason reverse the judgment thereupon. Rev. St. 1899, §§ 659, 865. Those criticisms have been sufficiently answered in the brief of counsel for plaintiff, and need not be reviewed here.

3. It is finally contended that the judgment ought to be reversed because "there is no verdict in the case such as is contemplated by law." The verdict was signed by nine jurors, but, because the first juror who signed his name attached the word "foreman" to his signature, it is contended that the verdict was not that of the nine jurors who signed it. The statement of this proposition is a sufficient refutation of it.

Finding no error in the trial of this cause calling for a reversal of the judgment of the circuit court, the same is affirmed. All concur except GRAVES, J., not sitting.

LOUISVILLE & N. R. Co. v. LUCAS' ADM'R.

(Court of Appeals of Kentucky, Dec. 15, 1906.)

[98 S. W. Rep. 308.]

Railroads—Accident at Crossing—Questions for Jury.—In an action against a railroad for the death of plaintiff's decedent at a railroad crossing held that, under evidence of failure to give signals and that they were especially needful at the particular crossing, the question of defendant's negligence was for the jury.

Same.—In an action against a railroad for the death of plaintiff's decedent at a crossing the question of decedent's contributory negligence was, under conflicting evidence, a question for the jury.

Same.*—Failure of one about to drive across a railroad crossing to stop, look or listen was not of itself proof of contributory negli-

*See foot-notes appended to Louisville & N. R. Co. v. Ueltschi (Ky.), 21 R. R. R. 669, 44 Am. & Eng. R. Cas., N. S., 669.

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gence sufficient to prevent a recovery, especially where no train was due at the time.

Appeal—Harmless Error.—Civ. Code Prac. § 606, subsec. 3, provides that no person shall testify for himself in chief in an ordinary action after introducing other testimony for himself in chief. In an action by an administrator for the death of his decedent only two witnesses were introduced by him before the widow testified, and her testimony was confined to matters to which similar testimony was given by other witnesses. There was no contradiction thereto. Held, that if the statute applied to the widow the error in permitting her to testify was harmless.

Railroad—Accident at Crossing—Evidence.—In an action against a railroad for death of plaintiff's decedent at a crossing, testimony that the railroad should have erected certain buildings located at such crossing on the opposite side from where they were located, thereby removing them as obstructions and rendering the crossing more safe, was incompetent.

Appeal—Harmless Error—Admission of Evidence.—In an action against a railroad for an accident at a crossing error in admitting evidence that the railroad might have rendered the crossing more safe by locating its buildings in a different position was cured by the court giving an oral admonition to disregard such evidence, and later giving a written instruction that the railroad had the right to erect and maintain its structures as they were located.

Railroads—Accidents at Crossings—Duty in General.†—If a railroad knew or should have known that a crossing was unusually dangerous, and that the statutory signals and warnings were not sufficient to give reasonable notice of the approach of trains to the traveling public, it was its duty to use such other means to prevent injury to travelers as in the exercise of a reasonable judgment by ordinarily prudent persons might be considered necessary; and if the railroad neglected the statutory signals or such other signals as were so reasonably necessary, thereby causing the death of plaintiff's decedent, it was liable.

Death—Damages—Measure.—In an action for death the jury should assess the damages at such sum, not exceeding the amount claimed, as would reasonably compensate the estate of the deceased for the destruction of his power to earn money.

Railroads—Accidents at Crossings—Contributory Negligence.—It was the duty of decedent in crossing tracks of defendant railroad to take such care for his safety as a reasonably prudent man would have exercised under similar circumstances who was acquainted with the character of the crossing and the obstructions that prevented seeing or hearing approaching trains, and if decedent knew, or, by the exercise of ordinary care, could have known that the crossing was dangerous on account of its location and the obstructions, and failed to exercise this degree of ordinary care, or knew, or, by the exercise of ordinary care, could have known, that a train was approaching in proximity to the crossing, and failed to take such care for his own safety as an ordinarily prudent man would have taken and, on account of his negligence, the injury resulted, and would not have occurred except for such negligence, defendant was not liable.

Negligence—Definitions.‡—An instruction that ordinary care as used in instructions given meant such care as ordinarily prudent

†See foot-notes appended to *Louisville & N. R. Co. v. Sawyer* (Tenn.), 16 R. R. R. 800, 39 Am. & Eng. R. Cas., N. S., 800.

‡See foot-notes appended to *Colorado & S. Ry. Co. v. Webb* (Colo.), 21 R. R. R. 72, 44 Am. & Eng. R. Cas., N. S., 72; *Louisville Ry. Co. v. Esselman* (Ky.), 20 R. R. R. 627, 43 Am. & Eng. R. Cas., N. S., 627; *Alabama Great So. R. Co. v. Guest* (Ala.), 18 R. R. R. 759, 41 Am. & Eng. R. Cas., N. S., 759; *Sanders v. Central of Georgia Ry. Co.* (Ga.), 18 R. R. R. 7, 41 Am. & Eng. R. Cas., N. S., 7.

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persons would exercise under circumstances similar to those proven in the case, and that negligence was the failure to exercise ordinary care, was correct.

Railroads—Construction—Accidents at Crossing—Care Required.—A railroad was not guilty of negligence in constructing its depots and other structures at a point where they obstructed the view of the railroad from the crossing.

Trial—Verdict—Signature.—Nine, or any greater number, of the jury may make a verdict, but if less than the whole number make the verdict, it must be signed by all who make it. If the whole jury concur in the verdict, it may be signed by the foreman.

Same—Requests to Charge—Instructions Already Given.—Where instructions given embrace all the law it is not error to refuse those requested.

Death—Damages—Amount.—For the death of a mail carrier drawing \$50 a month, 35 years of age, and in good health, a verdict for \$8,000 was not excessive.

Appeal from Circuit Court, Woodford County.

Action by H. B. Morgan as administrator of the estate of William B. Lucas, deceased, against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

See 86 S. W. 682.

Wallace & Harris and *Jno. T. Shelby*, for appellant.

B. G. Williams, for appellee.

SETTLE, J. W. B. Lucas, a rural route mail carrier and resident of Woodford county, was run over and killed at a public crossing near Ducker's Station, in Woodford county, by a train of the Chesapeake & Ohio Railway Company operated upon and over the track and roadbed of the appellant, Louisville & Nashville Railroad Company. This action was thereafter instituted in the court below against the latter company by appellee, H. B. Morgan, as administrator of the estate of decedent, to recover damages for his death, upon the ground, as alleged in the petition, that it was caused by the negligence of the servants of the Chesapeake & Ohio Railway Company in charge of the train by which he was killed. The answer denied the negligence charged, and pleaded contributory negligence on the part of the decedent. The latter plea was controverted by reply. The trial resulted in a verdict and judgment in favor of appellee for \$8,000, of which, and certain rulings of the lower court, assigned as error, appellant complains.

At Ducker's Station there are two crossings, one east and the other west of the depot. The crossings are 531 feet apart. Appellee's intestate was killed at the west crossing on his way from Spring Station west toward and beyond Ducker's Station. Thus traveling the pike, he had to cross appellant's track nearly at right angles, and, in approaching the west crossing, the view of the track in the direction from which the train that killed him came was obstructed by cattle pens, the depot and a coal-house east of the depot, all belonging to appellant, and situated on its station grounds. According to the evidence Lucas ap-

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proached the crossing in his mail wagon at a gait but little faster than the horse he was driving might have walked; as the horse got about across the track, the train, which Lucas could not sooner have seen, came in view at the depot, a distance of 300 feet from the crossing. Realizing his peril Lucas attempted to jump from the wagon, in doing which he was struck by the train and instantly killed.

It may safely be assumed that the following facts were fully established by the evidence: (1) That the crossing at which Lucas was killed is much traveled, and an unusually dangerous one. (2) That the train which struck him was $3\frac{1}{4}$ hours late. (3) That ordinarily there were no trains due at Ducker's Station at the time Lucas was killed. (4) That the train in question was running at from 45 to 50 miles an hour. (5) That its speed was not slackened, but rather accelerated, as in approaching the crossing it was downgrade. (6) That the engineer did not see the horse and wagon of Lucas on the track until the engine was within 50 feet of the crossing. (7) That one going as Lucas was, while between the crossings and until reaching the west crossing, would have his back to a train coming from the east. (8) That the whistling post is at such a distance from the crossing where Lucas was killed that one approaching the crossing in a wagon as he did, would, in all probability, be unable to hear the engine whistle when sounded at the post, if the wind were blowing from a direction opposite to that of the approaching train. (9) That the cattle pens, depot and coal chute so obstruct the view looking east from and near the crossing, that a train coming from the east cannot be seen by one situated as was Lucas until it gets to the depot, which is 300 feet from the west crossing.

Though railroad crossings are provided for the use of the public, the trains of the railroad company are entitled to the right of way, and a traveler of the highway upon reaching the crossing must stop to allow an approaching train to pass, but this requirement is conditioned upon the train's giving due and timely warning of its approach. It is insisted for appellee that those in charge of the train by which his intestate was killed did not give such warning in approaching the west crossing, and that, in view of the unusually dangerous character of the crossing, the usual signal from whistle or bell, if given, would, without a slackening of its speed, have been insufficient to warn the decedent of the coming of the train. In respect to what signals, if any, were given by the train, the evidence was conflicting, but we think it fairly established the fact that the station signal was given by the sounding of the whistle at the whistling post, which is a third of a mile from the place of the accident. The engineer, fireman, conductor, and a mail clerk on the train, testified positively that, in addition to the sounding of the station whistle at the post, there was a continuous or alternate blowing of the whistle and ringing of the bell until the engine reached

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the crossing. Others testified to some blowing of the whistle or ringing of the bell, but not that they were used continuously or alternately as required by the statute.

On the other hand, quite a number of witnesses, probably not less than 20, testified that the statutory signalling was not done by the train. Some of these witnesses stated that no signal was given by either whistle or bell after the train passed the whistling post; and others, that if any such were given, they did not hear them. It also appears from the evidence that nearly all the witnesses referred to were so situated as to be able to see and hear the train as it passed, for which reason it cannot be claimed that they did not have opportunities to know whether or not those in charge of the train gave the decedent due and timely warning of its coming. Appellee's testimony on this point was not, as argued for appellant, all of a negative character. Some of it was negative, but much of it was positive. It was the province of the jury to consider it in connection with that of appellant, and determine whether as a whole, it furnished proof of negligence on the part of those in charge of the train, and, if so, whether such negligence caused the death of the decedent. Obviously, the case should have gone to the jury, for not only was there some evidence of a failure to give the necessary signals of the approach of the train, but also evidence that they were specially needful in approaching this particular crossing, in view of the great speed of the train; that it was greatly behind its usual time, and of the existence of the many obstructions in the way of its being seen by persons from and near the crossing.

It is, however, insisted for appellant that the jury should have been peremptorily instructed to find for it because of Lucas' contributory negligence. We think this contention untenable. There was some evidence of contributory negligence furnished by the testimony of Lavenia Dickey and H. C. Long, the locomotive fireman. Mrs. Dickey lives 250 yards from the crossing where Lucas was killed. According to her testimony, he was reading a newspaper when he passed her house. Long said when he got sight of Lucas at the crossing he seemed to have something like a newspaper in his hand, but he could not say he was reading. Birdie Harrod testified that she saw Lucas when and after he was seen by Mrs. Dickey, that he had no newspaper, and was not reading. Lucas was seen by M. C. Darnell and Hickman Darnell after he passed Mrs. Dickey's and by one of them until he reached the crossing, yet neither of these saw a newspaper, though his face was toward the Darnell house for a distance of 75 yards after he passed the Dickey house, and his back was then toward Mrs. Dickey.

It is also contended by appellant's counsel that Lucas might have escaped, but for a rash attempt to save his horse. We hardly think this contention consistent with their other theory that he lost his life as the result of his carelessness in driving

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upon the track without looking for the train, or heeding its signals. The contention that he was trying to save his horse is based on the testimony of the fireman, who said that when he first saw Lucas, the horse was in the act of crossing between the main and side tracks, and the wagon was on the side track; that Lucas jumped out and tried to get around in front of his horse. The witness said he then told the engineer to "look out, there is a man about to come upon the track * * * he put the brakes on and sounded the whistle, and it was too late to do any good, it hit him before we could make a stop." These statements of the fireman do not seem to be corroborated by any other eyewitness, and are contradicted by certain physical facts. As, according to the evidence, the side track at the crossing is 10 feet from the main track, and the engineer said the engine was within 50 feet of the crossing when the fireman called his attention to Lucas, it does not seem possible that the horse could have gotten on the main track, and Lucas jump from the wagon 10 feet away and also get on the main track near the horse before or by the time the engine, going at the rate of 45 miles an hour, could traverse the 50 feet, and reach the crossing. Moreover, it further appears that the horse by the collision with the engine was thrown on the far side of the track, and the wagon and body of Lucas on the other, or near side, thereby demonstrating that the horse, instead of being in the act of getting on the main track when struck by the engine, was well nigh over it, and that Lucas and the wagon were getting upon or barely on the main track, which would seem to sustain appellee's theory that both horse and wagon were on the track when the collision occurred, and that Lucas was killed in attempting to jump from the wagon. At any rate, it will readily be seen that, while the contention of appellant that Lucas' death was caused by his own negligence finds some support from the testimony of the fireman and Mrs. Dickey, it is patent that the evidence furnished by Birdie Harrod, the Darnells, and the physical facts referred to, strongly conduced to prove that he was not guilty of negligence. There was, therefore, an issue of fact as to whether Lucas was guilty of contributory negligence, and whether such negligence caused his death, in respect to which there was a contrariety of evidence, making it necessary to submit the question to the jury.

If, as argued by appellant's counsel, the decedent did not, before going upon the crossing, stop, look, or listen, to ascertain whether a train was approaching, such failure was not of itself proof of contributory negligence sufficient to prevent a recovery. Especially should it not be so regarded when, as in this case, there was no train due, and that fact was known to the decedent: "Whatever may be the rule elsewhere, it has been definitely settled by this court that it is not to be presumed in the absence of evidence as to the care exercised by a person injured or killed on a railroad, where he had the right to be,

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that he recklessly or carelessly imperiled his own life." *Cahill v. Cin., etc., Ry. Co.*, 92 Ky. 345, 18 S. A. 2; *Lou., etc., R. R. Co. v. Goetz*, 79 Ky. 442, 42 Am. Rep. 227. In other words, contributory negligence will not be presumed. It must be proved. And the burden of proving it in this case was on the appellant. While that of proving negligence on the part of those operating the train in failing to give due and timely notice of its approach to the crossing, was upon appellee. A peremptory instruction should be denied when the inferences of negligence to be deduced from proved or admitted facts are such as the jury might fairly differ about.

Appellant also complains that the court erred in permitting the decedent's widow to testify in chief after other witnesses had been introduced by appellee, and their testimony given in his behalf. This contention is based on subsection 3, section 606, Civ. Code Prac., which provides: "No person shall testify for himself, in chief, in an ordinary action, after introducing other testimony for himself, in chief." It is argued that as the widow and children are, under the statute, the beneficiaries of the judgment that may be, and in this case was, recovered, they are to be regarded as parties in interest, if not in fact, to the action. As the interests of the children were distinct from that of the widow, though the harsh application of the Code provision invoked authorized her exclusion as a witness in her own behalf, no reason is perceived why she should not have been allowed to testify for them. However, waiving further discussion of that matter, it is sufficient to say that the error, if any was committed by the lower court, in permitting her to testify, was not prejudicial to appellant. The appellee did not himself testify, and only two witnesses were introduced by him before the widow testified, one being the photographer who identified certain photographs he had made of the place of the accident and surrounding objects; and the other the county surveyor, who testified as to certain distances according to his measurements. The widow's testimony was confined to such matters as the decedent's age, condition of health, ability to labor, and what he was earning at the time of his death. As there were two other witnesses, J. C. Noel and R. W. Noel, who testified substantially to the same facts given in evidence by Mrs. Lucas, and there was no contradiction of her testimony or theirs, no presumption will be indulged that her failure to testify would have strengthened the defense interposed by appellant, or lessened the amount of the verdict. In *Barkley v. Bradford*, 100 Ky. 304, 38 S. W. 432, the question here presented was decided by this court. One of two defendants was permitted by the lower court to testify after he had caused to be read to the jury in his behalf the deposition of one not a party. This error was urged upon appeal as a ground for reversal, but this court, speaking through Judge Lewis, said: "But that (referring to subsection 3, section 606, Civ. Code Prac.) is a rule of practice, not of right, and

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if a party appealing has not been prejudiced by violation of it. this court would not upon that ground alone reverse a judgment in other respects regular and proper."

Appellant further contends that the court erred to its prejudice in permitting to go to the jury the testimony of Thos. W. Scott, J. C. Noel, and R. W. Noel, to the effect that appellant could have erected the Ducker's Station Depot and cattle pens on the opposite side of the railroad track from where they are at present located, thereby removing them as obstructions, and rendering safer for the use of the public the crossing at which Lucas was killed. Manifestly, this testimony was incompetent, but we find from the recitals of the record that the learned special judge, soon after its admission, used great care to exclude it from the consideration of the jury. Not content with the oral admonition he gave the jury, during the taking of the evidence, to disregard the incompetent testimony in question, the judge later, and after both parties had concluded their evidence, in writing instructed the jury, in substance, that appellant had the right to erect and maintain its depot, stock pens, and other necessary structures as now located.

Finally, it is earnestly insisted for appellant that the jury were not properly instructed, and that the trial judge also erred in refusing the several instructions asked by appellant. Hardly a paragraph of the instructions given by the court has escaped criticism at the hands of counsel. It is objected, among other things, that they give undue prominence to the dangerous character of the crossing at which the decedent met his death; that they specify with too much particularity the duties of appellant, and are too general in defining the duty of decedent, and that they fail to advise the jury that the rights and duties of appellant and the decedent were reciprocal.

Being of opinion that the instructions themselves present a sufficient answer to these criticisms, we set them out in the opinion:

No. 1. "The jury are instructed that it was the duty of defendant and the employees in charge of the engine and train that struck and killed Wm. B. Lucas, to sound the engine whistle or ring the engine bell at a point not less than 50 rods east of the crossing at which he was struck and killed, and to sound the whistle or ring the bell continuously or alternately from that point to the crossing, and if the jury believe from the evidence that the location of the crossing at which Lucas was killed, and the amount of public travel thereon, and the buildings or other structures of the defendant company in proximity to the crossing obstructed the view and hearing of approaching trains, and that, for these reasons, the crossing was unusually dangerous to travelers, and that the sounding of the whistle and ringing the bell as directed was not sufficient to give reasonable notice of the approach of trains to the traveling public at said crossing, and this was known to defendant, or, by the

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exercise of ordinary care, could have been known by it, then it was the further duty of defendant, and the persons in charge of its trains, to use such other means to prevent injury to travelers at said crossing as, in the exercise of a reasonable judgment by ordinarily prudent persons operating the railroad, might be considered necessary, and if the jury believe from the evidence that the defendant and the employees in charge of the train that struck Lucas failed to discharge the duty imposed by ringing the bell or sounding the whistle, as herein set out, or to provide the other methods herein set out, if considered necessary for the reasons herein stated, by the persons operating the said road, and further believe that deceased lost his life by the negligence and carelessness of defendant and said employees, if any has been proven, then they should find for plaintiff, unless they believe the state of facts existed that are set out in instruction No. 3.

No. 2. "If the jury find for plaintiff, they should assess the damages at such a sum, not exceeding \$25,000, as will reasonably compensate the estate of Wm. Lucas for the destruction of his power to earn money.

No. 3. "The jury are instructed that it was the duty of Wm. Lucas in crossing the tracks of defendant at the place he was killed, to take such care for his own safety as a reasonably prudent man would have exercised under circumstances similar to those proven in this case, who was acquainted with the character of the crossing, and the obstructions, if any, that prevented seeing or hearing approaching trains, if he (Lucas) knew, or by the exercise of ordinary care could have known, that the crossing was dangerous, if it was dangerous, on account of its location and the obstructions, if any; and if Lucas failed to exercise this degree of care, or if they believe from the evidence that he knew, or, by the exercise of ordinary care could have known, that the train was approaching in proximity to said crossing, and failed to take such care for his own safety as an ordinarily prudent man would have taken, and that on account of his negligence and carelessness in these respects, if any, the injury to him that resulted in his death occurred, and would not have occurred except for such negligence and carelessness, if any, they should find for defendant.

No. 4. "Ordinary care as used in these instructions means such care as ordinarily prudent persons would exercise under circumstances similar to those proven in this case. Negligence is the failure to exercise ordinary care.

No. 5. "The jury are instructed that the defendant has the right to erect depots, stock pens, and other structures necessary for its use, at the places where it did erect them.

No. 6. "Nine, or any greater number, of the jury may make a verdict, but if less than the whole number make the verdict, it must be signed by all who make it. If the whole jury concur in the verdict, it may be signed by the foreman."

We think the law in respect to every aspect of the case was

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correctly and fairly given the jury by the instructions, and the record throughout manifests the admirable care, impartiality, and ability with which the special judge conducted the trial. As the instructions given embrace all the law of the case, it was not error to refuse those asked by appellant. At the time of his death the decedent was but 35 years of age, in good health, and his earning capacity about \$50 per month; in view of these facts, and of his expectancy of life, the amount of the verdict cannot be regarded excessive.

Judgment affirmed.

SHIPMAN v. CHICAGO, B. & Q. R. Co.

(Supreme Court of Nebraska, Jan. 5, 1907.)

[110 N. W. Rep. 535.]

Railroads—Fires—Evidence—Presumption.*—In an action against a railroad company for damages for loss by fire, alleged to have been set out from one of defendant's engines, proof of the fact that the damages did result from fire so set out, without any fault on the part of the complainant, is sufficient to raise a presumption of negligence in the management or equipment of the engine.

Same—Burden of Proof.—In such a case, however, it is prejudicial error to instruct the jury that, if the evidence is evenly balanced on the question of defendant's negligence, they should find a verdict for plaintiff.

(Syllabus by the Court.)

Commissioner's Opinion. Department No. 1. Appeal from District Court, Dawes County; Harrington, Judge.

Action by Thomas R. Shipman against the Chicago, Burlington & Quincy Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

N. K. Griggs, for appellant.

J. E. Porter, for appellee.

OLDHAM, C. This was an action for damages for the destruction of a stack of straw and fodder by fire alleged to have been started by sparks from an engine of the defendant. There was a trial of the issues to the court and jury, verdict and judgment for plaintiff, from which the defendant appeals.

The evidence with reference to the origin of the fire is that the stack of straw was about 200 feet north of defendant's line of railroad; that a long and heavily loaded freight train passed the stack about five or ten minutes before the fire was dis-

*See foot-notes appended to *Illinois Cent. R. Co. v. Bailey* (Ill.), 21 R. R. R. 664, 44 Am. & Eng. R. Cas., N. S., 664; foot-notes appended to *Cincinnati, etc., Ry. Co. v. South Fork Coal Co.* (C. C. A.), 17 R. R. R. 280, 40 Am. & Eng. R. Cas., N. S., 280; *Phillips v. Durham & C. R. Co.* (N. Car.), 17 R. R. R. 704, 40 Am. & Eng. R. Cas., N. S., 704; foot-notes appended to *Toledo, etc., R. Co. v. Fenstermaker* (Ind.), 16 R. R. R. 855, 39 Am. & Eng. R. Cas., N. S., 855.

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covered; that the engine of the train was puffing and laboring in an effort to increase its speed at the time it passed the straw stack; and that there was a strong wind blowing from the southwest when the train passed. The fire was first discovered by the crew in charge of a second freight train that followed about 10 minutes behind the first train. It is testified without dispute that the straw stack was burning before the second train reached it, so that it is clear from the record that, if the fire started from defendant's engine, it must have been from the engine pulling the first train. There was no rubbish or combustible material along the right of way near the stack, and no cinders or ashes were found along the track, and no evidence of any fire between the track and the stack of straw, so that it is clear that, if the fire came from the engine, it must have been communicated by a spark, or sparks, which escaped from the smokestack of the engine, and not from coals and cinders dropping from the fire box. Evidence was introduced on the part of the railroad company tending to show that the engine which pulled the train first passing the stack was in first-class condition, and contained all modern equipment for the prevention of the spread of fire, and that it was being operated on a trip by a skillful engineer under the supervision of an inspector of engines; that the engine was examined and reported on by the expert in charge at Ardmore, the last station passed before the fire, and again at Crawford, the first station reached after the fire; and that each of these examinations showed the engine in perfect condition.

In this state of the record the court, in paragraph 2 of instructions given on its own motion, after stating correctly the general rule of liability of railroads for negligently setting out fire from their passing trains, gave the following direction: "And in this case if you find that plaintiff has established by a preponderance of the evidence that fire did escape from the engine of defendant, and caused the destruction of plaintiff's property, and that plaintiff's property was destroyed without any carelessness or negligence on his part, then your verdict should be for the plaintiff, unless the defendant has established by a preponderance of the evidence that its engine was fully supplied with a spark arrester and other contrivances of the most approved style and pattern to prevent the escape of fire from the engine, and that the defendant's engine was being operated by careful and skillful men, and that said fire did not originate from defendant's engine by the carelessness and negligence of defendant's servants having the same in charge. And if the defendant has established, by a preponderance of the evidence, the facts as indicated in this instruction, which the defendant is required to establish, then your verdict should be for the defendant. But if the evidence as to these facts should be evenly balanced, or should preponderate in favor of the plaintiff, then your verdict should be for the plaintiff, and it will be your duty to assess plaintiff's damage at such sum as you think the evidence shows plaintiff has sus-

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tained, if you find for the plaintiff." Neither in this country nor in England are steam railroads, in the absence of a statute to the contrary, held liable for the accidental escape of fire in their operation. Negligence in the spread of fire is the gist of an action for damages against them. But, while railroad companies are not insurers against accidental fires started from their engines, they are required to use a proper degree of care both in the appliances used and in the operation of their trains to avoid liability. In other words, they must use the best modern appliances known to the occupation, and must keep them in good repair and have them operated with care and caution by those in charge of the trains. 2 Thompson on Negligence, 794, § 2332. In this jurisdiction proof of the fact that damage has resulted from a fire started from a railroad engine, without any negligence on the part of the complainant, is sufficient to raise a presumption of negligence in the management or equipment of the engine. *B. & M. R. R. Co. v. Westover*, 4 Neb. 268; *Union Pac. Ry. Co. v. Keller*, 36 Neb. 189, 54 N. W. 420.

While there is, perhaps, sufficient circumstantial evidence in the record to support the finding of the jury that the fire originated from defendant's engine, yet the evidence of such fact is not wholly convincing, and it is clear, as before stated, that, if the fire came from the engine, it must have been from a spark thrown from the smokestack of the engine. It is in evidence, and also a matter of almost common information, that no modern appliance has yet been devised that will absolutely prevent the escape of sparks from the best constructed engines. Consequently, where the only proof of escape of fire is by reason of a spark from the smokestack of the engine, presumption of negligence from such fact is much less convincing than is proof of the escape of fire by cinders and coals dropping from the fire box, since experience shows that the fire box can be so constructed and handled as to absolutely prevent the escape of fire therefrom. We think, therefore, that the instruction above set out was erroneous and prejudicial in saying: "But, if the evidence of these facts should be evenly balanced or should preponderate in favor of the plaintiff, then your verdict should be for the plaintiff."

This court is now committed to the doctrine that the burden of proof does not shift during the progress of the trial. While the necessity of the case has induced us to go to the limit in indulging presumptions as substitutes for proof in establishing negligence in the spread of fires from railroad trains, yet, in the absence of a statute making railroads insurers against loss by fire started from their engines, we see no reason to extend the rule of liability beyond the doctrine announced in *B. & M. v. Westover* and *U. P. Ry. Co. v. Keller*, *supra*. Especially should this not be done in a case like the one at bar, in which plaintiff's showing of negligence hangs only on the eyebrows of a very weak and emaciated presumption. We therefore

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conclude that the giving of the instruction above set out was prejudicial to the rights of the defendant, and we recommend that the judgment be reversed and the cause remanded for further proceedings.

AMES and EPPERSON, CC., concur.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment of the district court is reversed, and the cause remanded for further proceedings.

SOUTHERN RY. CO. v. PURYEAR.

(Supreme Court of Georgia, Dec. 12, 1906.)

[56 S. E. Rep. 73.]

Railroads—Killing Stock—Evidence.—Whether or not a train slackened speed at a given point where stock was injured, and, if so, to what extent, being in conflict, evidence that it was behind time was admissible to show that there was a reason or motive for not stopping, or for making rapid speed. *Killian v. Georgia R. Co.*, 25 S. E. 384, 97 Ga. 727.

New Trial—Sufficiency of Evidence.—There being some conflict in the evidence on material points and enough evidence to authorize the verdict, there was no error in refusing to grant a new trial, although the evidence of the agents on defendant's engine which killed the plaintiff's mules, if taken alone, may have made out a complete defense.

(Syllabus by the Court.)

Error from Superior Court, Whitfield County; A. W. Fite, Judge.

Action by D. Puryear against the Southern Railway Company. Judgment for plaintiff. Defendant brings error. Affirmed.

Shumate & Maddox, for plaintiff in error.

Geo. G. Glenn and *M. C. Tarver*, for defendant in error.

LUMPKIN, J. Judgment affirmed. All the Justices concur.

GERRY v. NEW YORK, N. H. & H. R. R.

(Supreme Judicial Court of Massachusetts, Suffolk, Jan. 4, 1907.)

[79 N. E. Rep. 783.]

Railroads—Operation—Injuries to Animals—Effect of Regulations.—The regulations approved by railroad commissioners, limiting the speed of trains, are designed for the safety of trains, and do not alter or affect a railroad company's duty to one permitting a horse to stand near its track.

Same—Statute Requiring Fences—Effect.—Pub. St. c. 112, § 115 (Rev. Laws. c. 111, § 120), requiring railroad companies to fence their

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roads, is intended only for the protection of adjoining owners, and does not affect a company's liability for injuries resulting to one who left his horse standing near its track.

Report from Superior Court, Suffolk County; Jas. B. Richardson, Judge.

Action by one Gerry against the New York, New Haven & Hartford Railroad. On report from superior court. Judgment for defendant.

J. O. Teele and *A. P. Teele*, for plaintiff.

Choate, Hall & Stewart, for defendant.

HAMMOND, J. Whatever may be thought of the conduct of the plaintiff in leaving his horse at a place immediately adjoining the railroad track, where he must have known that trains might approach at any time, when he might have selected a safer place, we think that the ruling that the plaintiff could not recover should stand upon the ground that the accident is not shown to have been due to any negligence of the defendant.

The plaintiff seems to rely upon the speed of the train as showing negligence, but it is not shown that the speed as such was unusual. If it be contended that it was faster than allowed by the regulations approved by the railroad commissioners and that this fact of itself is evidence of negligence, the answer is that these regulations were made for the safety of the trains and they in no respect altered or affected the duty owed to one in the situation of the plaintiff. Moreover it is the merest conjecture whether the speed of the train had anything whatever to do with the accident. The plaintiff also complains of the noise of the train, but trains always make noise, and there is no evidence that this train made any more noise than may be reasonably expected of such a train, much less that the noise was due to any negligent act of the defendant.

As to the contention of the plaintiff that he had the right to go to the jury on the question of the negligence of the defendant in the matter of fences and barriers, the answer is that in so far as this contention is based upon the statute requiring fences and barriers to be put up along the line of the railroad, the statute was intended only for the protection of adjoining owners (Pub. St. c. 112, § 115; Rev. Laws, c. 111, § 120; *Byrnes v. Boston & Maine R. R.*, 181 Mass. 322, 63 N. E. 897, and cases there cited); and in so far as it rests upon other grounds there is no evidence of negligence. Such an arrangement of track and freight yards is of common occurrence in the country.

Judgment on the verdict.

BEVERLEY *et al.* v. BOSTON ELEVATED RY. CO. (two cases).

(Supreme Judicial Court of Massachusetts, Suffolk, Feb. 28, 1907.)

[80 N. E. Rep. 597.]

Evidence—Opinion Evidence—Negligence—Injuries to Passenger at Station.*—Where, in an action against an elevated street railway for injuries received through being crowded off a station platform, the alleged negligence consisting in failing to maintain a large enough platform and in allowing too many passengers to congregate thereon at a time, a witness was properly allowed to answer the question whether, if three cars unloaded 33 passengers each on the platform, it would make a fair-sized crowd thereon.

Same—Facts or Opinions.*—Plaintiff was also properly permitted to ask defendant's inspector of surface cars whether the crowd on the platform of the station could be controlled by the number of incoming surface cars allowed to go into the station, by the number of persons admitted into the station through the turnstiles, and if, by controlling them there, the size of the crowd in the station could be controlled.

Negligence—Evidence—Precautions against Recurrence of Injury.†—Evidence that subsequent to the action defendant had extended its platform, while also admissible for the purpose of showing that it was practically possible for defendant so to do, having regard to the conduct of its business, was not admissible for the purpose of showing negligence on defendant's part at the time of the accident.

Appeal and Error—Objection Not Made below.—Where, in an action for injuries through negligence, no objection was made at the trial that the negligence alleged in the declaration did not cover a certain question, the objection was not open on appeal.

Carriers—Negligence—Injuries to Passenger at Station—Evidence.—In an action against an elevated street railway for injuries received through being crowded off defendant's station platform by reason of defendant's failing to provide proper platform facilities, a question, asked one of the defendant's witnesses, whether or not, in determining the plan of operating a street railway, it was proper to consider the desires of the traveling public, where they can be taken into consideration without interfering with safety in the operation of the road, was properly excluded.

Same—Trial—Questions for Jury.—In an action against a street railway for injuries received through being pushed off a station platform, which defendant was alleged to have permitted to become overcrowded, plaintiff had a right to go to the jury on the grounds that the platform in question was too small to take care of the passengers who landed on it, and that the guard who should have been on the platform was not there.

Same—Instructions.—In an action against a street railway for in-

*For the authorities in this series on the subject of the admissibility of expert and opinion evidence, see foot-notes appended to *Withey v. Pere Marquette R. Co.* (Mich.), 21 R. R. R. 740, 44 Am. & Eng. R. Cas., N. S., 740; foot-notes appended to *Tiffin v. St. Louis, I. M. & S. Ry. Co.* (Ark.), 21 R. R. R. 113, 44 Am. & Eng. R. Cas., N. S., 113; *Sanitary Dist. v. Pittsburgh, etc., Ry. Co.* (Ill.), 20 R. R. R. 145, 43 Am. & Eng. R. Cas., N. S., 145; *Elgin, etc., Traction Co. v. Wilson* (Ill.), 20 R. R. R. 37, 43 Am. & Eng. R. Cas., N. S., 37.

†For the authorities in this series on the question of the admissibility of evidence of subsequent repairs or other subsequent precautions, in negligence cases, see foot-note appended to *Louisville & N. R. Co. v. Morton* (Ky.), 20 R. R. R. 249, 43 Am. & Eng. R. Cas., N. S., 249.

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juries received through being pushed off a station platform, which defendant was alleged to have permitted to become overcrowded, a requested ruling that defendant was not responsible for accidents happening solely through the ordinary rushing and crowding occurring on the road during such hours was properly refused.

Exceptions from Superior Court, Suffolk County; William Cushing Wait, Judge.

Actions by Martha V. Beverley and by Edward Beverley against the Boston Elevated Railway Company. Verdicts for plaintiffs, and defendant brings exceptions. Exceptions overruled.

These two were actions of tort, the first being brought by plaintiff Martha V. Beverley to recover for personal injuries alleged to have been received through the defendant's negligence on December 3, 1903, at the Sullivan Square terminal of the defendant's elevated railway; the second being brought by Edward Beverley, her husband, to recover for the loss of her services and the expenses of care and medical attendance upon her in consequence of the alleged injury.

Plaintiff Martha V. Beverley claimed that after leaving the car at defendant's station she was pushed from the platform at the station by reason of a great crowd thereon and in falling received injuries.

The eighth requested ruling mentioned in the opinion was as follows:

"The defendant company is not responsible for the negligent acts of other passengers which it could not foresee, nor is it responsible for accidents happening solely through the ordinary rushing and crowding which occurs on the elevated system during rush hours."

Walter I. Badger, N. L. Frothingham, and Philip G. Carleton, for plaintiffs.

Endicott P. Saltonstall and Sanford H. E. Freund, for defendant.

LORING, J. 1. The exception must be overruled to the admission of the question: "If three cars unloaded 33 passengers each upon the platform between Nos. 1 and 2 would it make a fair-sized crowd on that platform?"

An ordinary person does not know from a statement of the facts whether the unloading of three cars containing 33 passengers each would make a fair-sized crowd on the platform in question, the dimensions of which were in evidence. That is a conclusion which relates to matters which cannot be reproduced before the jury precisely as they appeared to the witness and which men in general are capable of understanding. The evidence comes within the rule laid down in *Commonwealth v. Sturtivant*, 117 Mass. 122, 19 Am. Rep. 401.

2. We are of opinion that the court could allow the plaintiff to ask James, the defendant's inspector of surface cars on the

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division in question, whether the crowd on the platform of the station could be controlled by the number of incoming surface cars allowed to go into the station, by the number of persons allowed to go into the station through the turnstiles, and by the number of incoming elevated trains allowed to go into the station; and that by controlling them there the size of the crowd in the station could be controlled. The issues being tried were in substance: First, was the defendant negligent in allowing the crowd to gather which did gather on the platform in question at the time in question? Second, was it negligent in the means which it adopted to control it? Third, was it negligent in the area of its platforms in connection with the length of tracks for cars to stand at one time in delivering and taking on passengers? The means which it had to prevent a crowd from gathering on the platform was a fact to be proved. The only objection made by the defendant is that every one knows the facts proved. If they do, the defendant was not injured by the admission of the evidence. If they do not, the evidence was admissible.

3. The next exception argued is the ruling of the court that it was competent for the plaintiff to prove that at some time since the accident the defendant had extended its platform so as to cover 25 feet in length of the inner end of track 1. This was offered by the plaintiff to show that it was not only physically possible to increase the platform in this way, which the defendant's counsel admitted, but that it was practically possible, having regard to the conduct of its business, which the defendant's counsel refused to concede. The court ruled that it was competent for the purpose for which it was offered, but not for the purpose of showing negligence on the part of the defendant at the time in question. For this purpose, under this condition of the evidence and of the contentions made by the defendant, the evidence was competent. No objection was made at the trial that the negligence alleged in the declaration did not cover this. For that reason this objection, if well taken, is not open now.

4. The question on trial was whether the defendant had been negligent in providing for the safety of passengers on its platforms arising from the dangers incident to the platforms being overcrowded. To go into a consideration of the propriety on the part of the defendant's officers of considering the desires of the traveling public to be carried rapidly when that could be done "without interfering with safety in the operation of the railroad" was not only not material to the issue on trial but would have tended to distract the attention of the jury from that issue. The presiding judge was right in excluding the question put to Pasho.

5. The plaintiff had a right to go to the jury on the doctrine of *Pomroy v. Boston & Northern St. Ry.* (Mass.) 79 N. E. 764, and also on these further grounds: (1) That the platform

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in question was too small to take care of the passengers who landed on it; and (2) that the guard (Taylor by name) who should have been on this platform was not there.

6. There was evidence that the platform was too small for the passengers who could be and were delivered onto it. The objection that this ground of negligence was not alleged in the declaration was not taken at the trial, as we have said before. For that reason the third ruling asked for was rightly refused.

7. It is hard to understand the contention of the defendant in insisting that the second part of the eighth ruling asked for by it should have been given. The jury were warranted in finding that the two crowds going in opposite directions were so great that the plaintiff was without her fault thrown off the platform on which the defendant placed her, into the pit of No. 1 track. Its contention under the eighth request for a ruling is that if this is the ordinary crowding which occurs during rush hours and the accident is due to that alone, it is not liable. But in our opinion that would make it liable. We do not see how a jury could find that the defendant company was not negligent when it continued to assemble on its platforms, at certain hours in the day, such large crowds, necessarily going in opposite directions, that those on the outside, in spite of all they can do, are carried off the platform into the trench in which the tracks are laid.

Exceptions overruled.

LINDH v. GREAT NORTHERN RY. CO.

(Supreme Court of Minnesota, Nov. 30, 1906.)

[109 N. W. Rep. 823.]

Damages—Mental Anguish—Injuries to Dead Body.*—An action ex delicto to recover damages for injured feelings lies at the suit of the husband against a common carrier for soiling and ruining the casket containing the body of his dead wife, and for mutilating and disfiguring the corpse by negligently and willfully exposing it to rain. *Larson v. Chase*, 50 N. W. 238, 47 Minn. 307, 14 L. R. A. 85, 28 Am. St. Rep. 370, followed and approved.

(Syllabus by the Court.)

Appeal from District Court, Polk County; William Watts, Judge.

Action by O. N. Lindh against the Great Northern Railway Company. From an order, overruling a demurrer to the complaint, defendant appeals. Affirmed.

M. L. Countryman and *A. C. Wilkinson*, for appellant.
W. E. Rowe and *C. O. Longley*, for respondent.

*See foot-note appended to *Louisville & N. R. Co. v. Wilson* (Ga.), 18 R. R. R. 389, 41 Am. & Eng. R. Cas., N. S., 389.

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JAGGARD, J. The following facts are alleged in the complaint in this action. The defendant and appellant, as a common carrier, undertook to transport a casket containing the body of the dead wife of plaintiff and respondent. In taking the casket through a named station, it became necessary to transfer the same to another of its trains. In so doing, defendant carelessly and negligently left the same out of doors upon a railroad truck, and exposed it to rain, and willfully ignored the request of the plaintiff to place the truck under cover, so that the rain might not get into the casket and injure and destroy the same as well as mutilate the corpse. Thereby the casket was soiled and ruined, and the corpse mutilated and greatly disfigured. Plaintiff suffered great mental anguish to his damage in the sum of \$1,000. From an order overruling a demurrer by the defendant, this appeal was taken.

This case is concluded by *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370. It was there held: The right to the possession of a dead body for the purposes of preservation and burial belongs, in the absence of any testamentary disposition, to the surviving husband or wife, or next of kin. This right is one which the law recognizes and will protect, and for any infraction of it, such as an unlawful mutilation of the remains, an action for damages will lie. In such an action a recovery may be had for injury to the feelings and mental suffering resulting directly and proximately from the wrongful act, although no actual pecuniary damage is alleged or proved. That case was followed and approved, for example, in *Foley v. Phelps*, 1 App. Div. 551, 37 N. Y. Supp. 471. In *Koerber v. Patek*, 123 Wis. 453, 102 N. W. 40, 43 68 L. R. A. 956, Mr. Justice Dodge says of *Larson v. Chase*, and *Foley v. Phelps*, after citing them and other cases: "The first two—and especially the first—of these cases may be considered leading as they have been cited as the basis for most of the later ones upon this immediate subject, and in many others approaching it." Later in the opinion he says: "In *Larson v. Chase*, supra, the remarks of Mitchell, J., on this subject, sentimental damages, are so philosophical that we cannot forbear quoting them. Scores of the cases in which *Larson v. Chase* has been followed and approved will be found collected in volume 2 of L. R. A. Cases as Authorities at pages 776 and 777. Modern textwriters with no known exception recognize it as a leading authority on the subject, and as announcing the true principle." That this decision accords with the spirit of the earlier law on this subject is demonstrated in an article by Mr. Justice Elliott, of this court, in 16 Cent. Law Jour. 161, and, see *Perley on Mortuary Law*, c. IV, p. 20 et seq.

No good reason is assigned for reversing that decision or for differentiating it from the case at bar. Injury to the feelings of the family of deceased spring as naturally from disfiguration and mutilation of the body by exposure to the elements as by

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dissection. Nor is there any merit in the contention of the defendant that this was an action on the contract, and that therefore there could be no recovery for mental anguish because of the breach of contract. The plaintiff is right in his insistence that the present case sounded in tort. It is elementary "that a tort is a violation of legal duty and may involve as one of its elements a breach of contract." *Rich v. N. Y. Cent. & H. R. Ry. Co.*, 87 N. Y. 382; *Chase's Lead. Cas.* 56; and, see *Mykleby v. C., St. P., M. & O. R. Co.*, 39 Minn. 54, 38 N. W. 763; *Ry. Co. v. Spirk (Neb)*, 70 N. W. 927. The complaint set forth a cause of action in quasi tort at least, for which an action *ex delicto* lies. 1 Jaggard on Torts, 22 et seq. *Louisville & N. R. Co. v. Wilson*, 123 Ga. 62, 51 S. E. 24, which also approves *Larson v. Chase*, is on all fours with the instant case. There the declaration alleged that a widow desired to have her husband's body carried by a railroad from the place of death to the place of intended burial; that the route was over the railroad to a junction, and thence by a branch of the same road to the destination; * * * that on arrival at the junction the company's agent had the coffin and body placed on an open platform in the rain, and allowed it to remain there for several hours while waiting for the second train to arrive, and refused, on request of the wife, to have it placed where it was protected from the weather; and that the coffin and shroud were damaged to the extent of \$75 and the body was "soaked, and otherwise mutilated," it was held that the declaration stated a cause of action.

Order affirmed.

BURKE v. BAY CITY TRACTION & ELECTRIC CO.

(Supreme Court of Michigan, Feb. 5, 1907.)

[110 N. W. Rep. 524.]

Carriers—Injury to Passengers—Contributory Negligence.—A street car passenger is not guilty of contributory negligence in alighting where the car comes to a stop for the purpose of permitting him and other passengers to alight and while he is alighting it suddenly starts.

Same—Negligence.—It is negligence to start a street car while a passenger is alighting therefrom at the express or implied invitation of the carrier.

Same—Alighting from Moving Car.*—It is not negligence *per se* for a street car passenger to attempt to alight at a usual stopping

*For the authorities in this series on the question whether it is contributory negligence on the part of a passenger to alight from a moving car or train, see foot-notes appended to *Waller v. Wilmington City Ry. Co.* (Del. Supr. Ct.), 21 R. R. R. 727, 44 Am. & Eng. R. Cas., N. S., 727; *Fore v. Alabama & V. Ry. Co.* (Miss.), 21 R. R. R. 694, 44 Am. & Eng. R. Cas., N. S., 694; foot-notes appended to *Joyce v. Los Angeles Ry. Co.* (Cal.), 20 R. R. R. 66, 43 Am. & Eng. R. Cas., N. S., 66; *Baltimore & O. S. W. R. Co. v. Mullen* (Ill.), 20 R. R. R. 6, 43 Am. & Eng. R. Cas., N. S., 6; foot-notes appended to

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place if he has given the proper signal for the car to stop, and at the time that he makes such attempt he believes the car has stopped though it has not, but is moving so slowly that a prudent person under the same circumstances would alight.

Trial—Verdict—Inconsistent Findings.—Where, in an action for personal injuries to a passenger while alighting from a street car, the jury, in their general verdict and answers to special questions, found that the car started when plaintiff was alighting, an affirmative answer to a special question, "Was the car at a full stop when plaintiff stepped or got off?" was not inconsistent, since, the question being ambiguous, it would be inferred that the answer is merely a finding that the car was at a full stop when plaintiff "stepped," and not that it was stopped when he "got off."

Error to Circuit Court, Bay County; Chester L. Collins, Judge.

Action by Asa Burke against the Bay City Traction & Electric company. From a judgment for plaintiff, defendant brings error. Affirmed.

Argued before CARPENTER, C. J. and MONTGOMERY, OSTRANDER, HOOKER, and MOORE, JJ.

T. A. E. & J. C. Weadock, for appellant.

De Vere Hall and F. P. McCormick, for appellee.

CARPENTER, C. J. Plaintiff brings this suit to recover compensation for injuries sustained October 7, 1904, while he was a passenger on one of defendant's street cars in Bay City. He testified that as the car approached Twenty-Third street, he indicated his desire to alight by giving the customary signal. "When it came within 12 or 14 feet of the crossing * * * she slacked down. * * * It had every appearance of stopping. * * * I went * * * on the rear platform. * * * Two passengers * * * got off before me. * * * I took hold of one [a bar] at the left side. I had my dinner basket in my right hand. After the second passenger got off, I fell down—I stepped down. The car was * * * probably five or six feet past the crossing. * * * When those passengers got off the car was not standing still. The car was right on the point of stopping when I went to step off. The last I noticed was when the second man stepped off, then it was right on the point of stopping. And I was satisfied, certain without any doubt, that it would be stopped by the time I could get down. I had to look so close to see the lower step that I didn't notice whether she had come to a stop or not, but, in my opinion, she had, but just as I stepped she shot off and I struck. * * * As soon as I struck I let go. I might have held on an inch

Cody v. Duluth St. Ry. Co. (Minn.), 18 R. R. R. 117, 41 Am. & Eng. R. Cas., N. S., 117; foot-notes appended to *Behen v. St. Louis Transit Co.* (Mo.), 18 R. R. R. 103, 41 Am. & Eng. R. Cas., N. S., 103; foot-notes appended to *Mearns v. Central R. R.* (N. J.), 17 R. R. R. 97, 40 Am. & Eng. R. Cas., N. S., 97; *Kansas City, etc., R. Co. v. Matthews* (Ala.), 17 R. R. R. 79, 40 Am. & Eng. R. Cas., N. S., 79.

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longer than I did if the car had not started." In consequence of this sudden starting of the car he (plaintiff) was thrown to the ground and injured. Plaintiff obtained a verdict and judgment in the circuit court. Defendant seeks a reversal upon several grounds.

First. It contends that a verdict should have been directed in its favor. This contention compels us to consider this question, Was there evidence that plaintiff was injured (a) in consequence of defendant's negligence, and (b) while he himself was in the exercise of due care? The jury might have inferred from plaintiff's testimony that the car came to stop for the purpose of permitting him and other passengers to alight, and that, while he was alighting, it suddenly started. To attempt to alight under these circumstances was not contributory negligence. To start the car under these circumstances was negligence. *Selby v. Detroit Railway*, 122 Mich. 311, 81 N. W. 106. Defendant refers to cases (*Bradley v. Railway Co.*, 94 Mich. 35, 53 N. W. 915; *Etson v. Railway Co.*, 110 Mich. 494, 68 N. W. 298; *Conroy v. Detroit United Railway*, 139 Mich. 173, 102 N. W. 641, 104 N. W. 319) holding that the acceleration of the speed of a street car between its stopping places is not evidence of negligence. The principle of these cases has no application where the car is started when a passenger is alighting therefrom at the invitation—express or implied—of the carrier. In such a case—and this is such a case—it is, as above stated, negligence for the carrier to start the car.

Second. Defendant contends that the court erred in giving the following instruction to the jury: "If the car was at the usual alighting place at the time that plaintiff attempted to alight, he would not be guilty of contributory negligence, as a matter of law, in alighting there, if he had given the proper signal for the car to stop and at the time he made such attempt he believed it had stopped, but it had not in fact, but was merely moving so slowly that a prudent person under the same circumstances would have alighted. If, however, the car had not practically come to a stop at the point and plaintiff was injured in consequence thereof, he cannot recover." Defendant contends that the foregoing instruction was erroneous on the ground that it was contributory negligence for plaintiff (a passenger) to attempt to alight if the car had the slightest motion. Upon this proposition we approve the following reasoning of the Supreme Court of Illinois (*Cicero Street Ry. Co. v. Meixner*, 160 Ill. 321, 43 N. E. 823, 31 L. R. A. 321): "Electricity as a motive power, while stronger and more powerful and with possibilities of greater speed, is at the same time more nearly under the control of the person in charge than horse power. The strict rule in force regarding the negligence of a person alighting or boarding an ordinary train of steam cars had for it many good and sufficient reasons, which are not applicable to the electric car, as in general use. In the latter case, stops

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are more frequent, and opportunity for great speed is not presented. Steps for passengers are near the ground, and the chances of a misstep or fall are not so great as in steam cars.

* * * While, in electric cars, the possibilities of speed are greater than in the case of horse cars, yet the general operation and management of such cars so nearly approaches those of horse cars that it must be held that the same rule of law * * * that it is not negligence per se to board or depart from such cars while in motion, is also applicable to electric cars." This does not mean that a court can never say, as a matter of law, that it is negligence for a passenger to get on or off a moving car. That depends on circumstances, the most important of which is its rapidity of motion. When it is moving as slow as indicated by the testimony in this case that question (the question of contributory negligence) should be left to the jury. See, also, Cyc. vol. 6, p. 684; Beach on Contributory Negligence, § 291.

Third. Certain special questions were submitted to and answered by the jury. We give those questions and their answers. "(1) Did the plaintiff get off the car before it stopped? A. No. (2) Did the car stop * * * before plaintiff got off? A. Yes. (3) Was the car at full stop when the plaintiff stepped or got off? A. Yes. (4) Was the car moving when the plaintiff got off? A. Yes. (5) Did the car * * * come to a stop * * * at the usual stopping place for passengers to alight? A. Yes." Defendant complains because the trial court declined to grant a new trial upon the ground that these answers were inconsistent with the verdict, and inconsistent with each other. It is apparent from the foregoing reasoning that the answer that the car was moving when the plaintiff got off is not inconsistent with the verdict. If, however, the answers imply that the car did not start while the plaintiff was alighting, they are inconsistent with the general verdict, for I think the verdict rests upon the proposition that the car did start at that time. Is it to be inferred from any of these answers that the car did not start while the plaintiff was alighting? If this inference is to be drawn it must be drawn from the answer "Yes" to question 3: "Was the car at full stop when the plaintiff stepped or got off?" This question is ambiguous. It is susceptible of two constructions. The jury might have understood it as asking if the car was at full stop, either when the plaintiff "stepped" or when he "got off" (and this question they would have answered "Yes" if they found that the car was at full stop when plaintiff stepped, though they found it was in motion before he had time to let go of the supporting bar with his left hand), or they might have understood that the words "stepped" and "got off" were used synonymously, and that they were asked if the car was at full stop when plaintiff alighted therefrom. If such ambiguous questions are submitted—and the trial court might very properly refuse to submit them—

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they should be construed as the jury understood them. Otherwise their answer is not given the effect that the jury intend. By what means shall we ascertain the understanding of the jury? The party who propounds such questions—in this case, the defendant—is responsible for their ambiguous character, and all serious doubts should be resolved against him. Under such circumstances it should be presumed that the jury placed that construction upon the question which makes their answer thereto harmonious with their general verdict and with their answers to the other special questions. Any other rule would give an unfair advantage to the party asking ambiguous questions and encourage him to persist in an improper practice. In the case at bar, by their general verdict and their answers to the other special questions, the jury have found that the car started when plaintiff was alighting. It follows that, by their answer to the question under consideration, they did not intend to declare that the car did not start when plaintiff was alighting; that they understood that question to ask if the car was at full stop, either when the plaintiff “stepped,” or when he “got off.” This question they could not answer “No,” because they determined that the car was at full stop when plaintiff stepped, and therefore, in accordance with this determination, they answered it “Yes.” The jury’s answer to question 3 is, then, merely a finding that the car was at full stop when plaintiff stepped. We conclude that the jury’s answers to the special questions are not inconsistent with their general verdict, and the same reasoning proves that those answers are not inconsistent with each other; and if they were, the verdict would not, for that reason, be disturbed. *Foster v. Gaffield*, 34 Mich. 356.

Fourth. It is contended that the court erred in refusing to grant a new trial upon the ground of newly discovered testimony. It is sufficient to say that, under the rule laid down in *Canfield v. Jackson*, 112 Mich. 123, 70 N. W. 444, and *Grand Rapids Electric Co. v. Walsh Manufacturing Co.* (Mich.) 105 N. W. 1, there was no error.

No other question demands consideration.

Judgment is affirmed.

KNOXVILLE TRACTION CO. *v.* WILKERSON (two cases).

(Supreme Court of Tennessee, Feb. 13, 1907.)

[99 S. W. Rep. 992.]

Carriers—Rules—Power to Make—Fares.*—Carriers may make regulations necessary for the proper control of the cars operated by them, and may within legal limits fix the fare to be charged and the time, place, and manner of payment.

Same—Reasonableness of Rules—Questions for Court.*—Whether a rule of a street railway company requiring conductors to be provided with currency or fractional coins to the amount of \$5, and to change bills or coins of that denomination or less when tendered in payment of a 5-cent fare, etc., is a reasonable one, is a question of law.

Same—Payment of Fare—Making Change.*—A street railway company, though not having the right to require the exact fare charged to be tendered by its passengers, may fix a limit on the amount of change it will undertake to furnish passengers.

Same—Ejection of Passenger.*—A rule of a street railway company requiring conductors to be provided with currency or fractional coins to the amount of \$5, and to change money of that denomination or less when tendered in payment of a 5-cent fare, and, on failure of a passenger to tender money of that denomination or less, to put him off the car, is a reasonable rule; and a conductor may refuse to change a \$10 bill tendered by a passenger for the payment of the fares of himself and wife, and may, on a failure to otherwise pay the fare, require them to leave the car, though the passenger had no knowledge of the rule.

Error to Circuit Court, Knox County; Jos. W. Sneed, Judge.

Separate actions by James Wilkerson against the Knoxville Traction Company, and by Ada Wilkerson, by next friend, against the same defendant. There were judgments for plaintiffs, and defendant brings error. Reversed.

Shields, Cates & Mountcastle, for plaintiff in error.

J. Rufus Ailor, for defendants in error.

SHIELDS, J. The Knoxville Traction Company, the plaintiff in error, is a corporation lawfully operating cars upon the streets of the city of Knoxville for the purpose of carrying passengers, and was engaged in this business when the matters complained of in this case occurred.

The defendant in error and his wife boarded one of the company's cars, and, upon being approached by the conductor of the car for fare, tendered to him a \$10 bill, all the money he had, for change and payment of their fare, which was 5 cents each.

The conductor declined to accept the bill, upon the ground that he was unable to make the change, and required the defendant in error and his wife to leave the car; no other offer of payment being made.

This action of the conductor is charged to have been unlaw-

*For the authorities in this series on the question of the validity of a carrier of passenger's rules and regulations, see foot-notes appended to *Illinois Cent. R. Co. v. Allen* (Ky.), 20 R. R. R. 49, 43 Am. & Eng. R. Cas., N. S., 49.

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ful, oppressive, and in violation of the right of the defendant in error to be transported by the plaintiff in error upon its car to his destination; and this action is brought to recover the damages sustained.

The plaintiff in error, in defense, relies upon a rule, theretofore made by it, requiring all conductors of cars to be provided with currency or fractional coins, or both, to the amount of \$5, and to change bills or coins of that denomination or less when tendered in payment of car fare, and, upon failure of the passenger to tender bills or coins of that sum or less, to put them off the cars.

There was no publication of this rule, nor does it appear that the defendant in error had actual notice of it. That common carriers are authorized to make and enforce all rules and regulations necessary for the proper government and control of the cars or other vehicles operated by them, and the public being transported thereon, is well established.

This includes the power, within legal limits, to fix the fare to be charged, and the time, place, and manner of payment. *Lane v. Railroad Co.*, 5 Lea (Tenn.) 124; *Reese v. Railroad Co.*, 131 Penn. 422, 19 Atl. 72, 6 L. R. A. 529, 17 Am. St. Rép. 818; *Lake Shore Railway Co. v. Greenwood*, 79 Pa. 373.

The only question presented by this defense is whether or not the rule relied upon is a reasonable one, and this is a question of law to be determined by the court.

The reasonableness of unreasonableness of rules made by public corporations affecting their relations with the public largely depends upon the peculiar business in which the corporation is engaged and the established custom and usages of the locality where it is operating. Rules of this character made by street railroads should be such as are fairly necessary to expedite the discharge of their duties to the public, and at the same time be consistent with the comfort, convenience, and safety of their passengers.

Street railroads are constructed and operated in cities and their suburbs, and are intended to furnish frequent, speedy, and cheap transportation to the inhabitants to and from different portions of the city in which located. To effect this purpose, they are required to have many lines and numerous cars and employees. They must stop at frequent intervals for the reception and discharge of passengers. Their patrons are numerous, and they cannot, with convenience to themselves or to the public, provide for the sale of tickets and require them of passengers. The fare usually charged is a flat or uniform one for all parts of the city, and the amount is a matter of common knowledge, and can be ascertained by any one proposing to take passage on a car, if not known, from almost any bystander. These facts, we think, clearly authorized the enforcement of the rule requiring a passenger to present in payment of his fare a bill or coin not exceeding \$5. In fact, the maximum allowed is most liberal

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towards the public. If one passenger could require change to be given for large bills, all could do so, because all have equal rights. To require the company to furnish change to every passenger calling for it in sums exceeding \$5 would impose a great burden and hardship upon it, while it is comparatively easy for its hundreds of patrons to provide change each for himself.

We do not think the company has the right to require the exact fare charged to be tendered, but it certainly may fix a limit upon the amount of change it will undertake to furnish its patrons.

In the case of *Barker v. Central Park N. & E. Ry. Co.*, 151 N. Y. 237, 45 N. E. 550, 35 L. R. A. 489, 56 Am. St. Rep. 626, a rule fixing the maximum amount of change to be furnished passengers at \$2 was held reasonable. In that case it is said: "In the case at bar, the reasonableness of the rule established by the defendant is obvious. In a large city like New York, the round trip of a car on any street line means a very considerable number of fares paid in, and the necessity for the conductor to carry and pay out a large amount of small change. When the defendant enacted the rule requiring its conductors to furnish change to a passenger to the amount of \$2, it did all that could reasonably be expected of it in consulting the convenience of the general public, and it would be unreasonable and burdensome to extend the amount to \$5. It would require conductors to carry a large amount of bills and small change on their persons, and greatly impede the rapid collection of fares."

We therefore hold that the rule of the plaintiff in error invoked in this case was reasonable, one which it had a right to enforce, and that its conductor had the right to refuse to change the bill tendered him by the defendant in error, and, upon his failure to otherwise pay the fare, to require him to leave the car.

It is also immaterial that this rule was unknown to the defendant in error. It is so reasonable in its terms and so necessary to the convenience of the company in the collection of fares that the public was charged with notice of it. Where the fare to be paid, as in this case, is so small, and the number of passengers so numerous, any one proposing to take passage upon one of the cars of the company is bound to know the necessity of providing himself with change reasonably near the amount of fare to be paid, and of the inconvenience and probably impossibility of the conductor furnishing change in large amounts.

Other assignments of error were disposed of orally.

HILLMAN v. GEORGIA R. & BANKING CO.

(Supreme Court of Georgia, Nov. 10, 1906.)

[56 S. E. Rep. 68.]

Carriers—Protection of Passengers—Care Required.*—A railroad company is bound to use extraordinary care and diligence to protect its passengers, while in transit, from violence, injury, or outrage or humiliation by third persons. This protection must be afforded by the conductor to the extent of all the power with which he is clothed by the company or by the law, and his failure to afford it, when he has knowledge that there is occasion for his interference, will subject the company to liability in damages.

Same—White and Colored Passengers—Accommodation.†—Railroads doing business in this state are required by its statutes to furnish "equal accommodations in separate cars or compartments of cars for white and colored passengers," and it is also declared that "the officers or employees having charge of such railroad cars shall not permit white and colored passengers to occupy the same car or compartment." Pen. Code. 1895, §§ 526, 529.

Same—Instructions.—The charge of the court did not accurately submit to the jury the law applicable to the case made by the pleadings and evidence, and entirely omitted any reference to the contention made by the plaintiff in his pleadings and evidence as to whether the conductor permitted a drunken and disorderly passenger to remain in a car where he had no right to be, and there to commit the acts complained of by the plaintiff.

(Syllabus by the Court.)

Error from Superior Court, Dekalb County; L. S. Roan, Judge.

Action by Jonas Hillman against the Georgia Railroad & Banking Company. Judgment for defendant, and plaintiff brings error. Reversed.

Jonas Hillman brought an action for damages against the Georgia Railroad & Banking Company, alleging as follows: On March 5, 1904, he was a passenger on a night train on defendant's road. On the train was a drunken ruffian and desperado by the name of Scruggs. When Scruggs boarded the train at Atlanta he was drunk, and the conductor saw him. knew his character, and was negligent in allowing him to board the train. When the train left Atlanta he began to curse and abuse the passengers, brandished a pistol, and continued his conduct until the train passed the station at Decatur. The conductor heard his language and saw his conduct, but did not arrest him or put him off the train. The conductor was notified

*For the authorities in this series on the subject of the duty of the carrier to protect its passengers against third persons, see foot-notes appended to *Norfolk & W. Ry. Co. v. Birchfield* (Va.), 21 R. R. R. 305, 44 Am. & Eng. R. Cas., N. S., 305; foot-notes appended to *St. Louis, etc., Ry. Co. v. Hatch* (Tenn.), 20 R. R. R. 782, 43 Am. & Eng. R. Cas., N. S., 782.

†For the authorities in this series on the subject of the duty to separate white and colored passengers, see foot-notes appended to *Waldauer v. Vicksburg Ry. & Light Co.* (Miss.), 20 R. R. R. 504, 43 Am. & Eng. R. Cas., N. S., 504.

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of the dangerous and threatening conduct of Scruggs several times before the assault upon the plaintiff. Scruggs went into the car for colored people, where he had no right to be, and where the plaintiff (a colored person) rightfully was, quietly seated, having paid his fare to his destination. Without cause Scruggs began a violent assault upon the plaintiff, in sight of the conductor. He drew a pistol, cursed and threatened to shoot the plaintiff, and drove the latter from his seat and out of the car, all the while in the presence of the conductor, whom the plaintiff asked for protection, but who failed to protect him. The defendant denied the substantial allegations of the petition. The evidence for the plaintiff was sufficient to support the essential allegations, and to authorize a recovery. On behalf of the defendant it was sought to show that Scruggs did not, in fact, commit all the acts alleged in the declaration. Witnesses for the defendant, however, testified that Scruggs had often ridden on the train previously in a drunken condition, but had never created a disturbance before; that he was somewhat drunk on board the train at the time of the occurrence complained of; that he wanted more liquor, and went into the car occupied by colored passengers, and was there for the purpose of trying to get a drink; that he was told that he had no business in there where negroes rode; that he said he intended to stay in there and get liquor to drink; and that he went back in the rear of the car which was being used for negroes that night, and sat with one of them. The defendant's conductor testified, among other things, as follows: "I put all the negroes in the smoker and compartment car. They occupied the whole car. I used the front end of it, the smoker part of it for the negroes. After leaving Atlanta I found Scruggs in the ladies' car in the rear of the negro car, and asked him for a ticket. He said: 'Cap, go ahead; I will give it to you directly.' * * * I went through and finished, and didn't see any more of him until after leaving Decatur. * * * I found Scruggs again, and he was in the front end of the negro car; that is, the negro car next to the baggage car. I said to him: 'Scruggs, you will have to come into this other car.' He was with the two negroes, talking to them. * * * I went on working the train, and hurried back after leaving Clarkston, and found him fussing in there. I told these two negroes to get him out of the car. I didn't have time to bother with him then. I came back after leaving Clarkston and found him and one of the negroes in a seat in the smoker of the partition car, sitting in there. They were sitting on the seat together. * * * Scruggs pulled out his knucks that way, and told this negro what a man he was. Then he reached in the other hip pocket and pulled out his pistol and said: 'I ain't scared of no damn man.' I said: 'Scruggs, you must put up that gun. I am not going to have any trouble in here at all.' This negro that was sitting with him, I said to him, to go in the other car. Scruggs had never ordered him in there

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at all. The negro got up and went on in the other car. Scruggs then asked me did I want the others out of there, and I said: 'No, I am using this car for the negroes tonight.' That time one or two negroes walked on through the other car. I think Jonas was about the second or third or fourth one, and he went on out with the other negroes. Scruggs said nothing to any of the negroes, only asked me did I want to get them out of there. I told him, 'No,' to let them alone; he had no right to bother them; and that I was using this car for the negroes. Then he got up after the negroes went out and said: 'If a darky puts his head through that door, I am going to shoot him.' About that time Jonas stuck his head in, I suppose it was Jonas, and he said: 'Give me my bundle.' I said: 'Keep your head back in there, and I will give you your bundle.' Scruggs had the gun in his hand, but he never pointed the gun or followed them. He simply held the gun in his hand. * * * I stayed with Scruggs until the train stopped at Stone Mountain. I went out on the steps and he got off. He didn't put his gun up until he got on the steps. * * * My flagman said that one of the negroes was complaining about not being protected, and I spoke to Jonas. Jonas did not speak to me; the flagman told me. I spoke to him. He asked me why I had not protected him. And I said I thought I did protect him. I asked him why he did not stay in there and help me, and he said: 'I was fixing to kill that man.' The defendant company afterwards caused Scruggs to be prosecuted and fined for pointing a pistol at Hillman. He was also indicted for carrying concealed weapons, but, on pleading guilty, to the former indictment, a nolle prosequi was entered as to the second. The jury found for the defendant. The plaintiff moved for a new trial: (1) Because the verdict was contrary to law and the evidence. (2) Because the court charged as follows: "A conductor or other agent would not be justified in expelling from a train a passenger of known bad or turbulent character, so long as such person was not guilty of conduct seriously annoying or dangerous to other passengers." (3) Because the court charges as follows: "If a passenger is guilty of boisterous and improper conduct, but desists from it after request or remonstrance or command of the conductor, the conductor would not be justified in expelling him from the train after he had so desisted." (4) Because the charge of the court did not cover or refer to the material issue in the case insisted on by the plaintiff—that Scruggs was in the car set apart for colored people, where he had no right to be, and there remained with the knowledge and permission of the conductor, who should have excluded him therefrom—that this was the proximate cause of the injury; and that the court made no reference to the law requiring separate cars for white and colored passengers on railroads. This motion was overruled, and the plaintiff excepted.

Gleaton & Gleaton, for plaintiff in error.

Jos. B. & Bryan Cumming and *M. A. Candler*, for defendant in error.

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LUMPKIN, J. (after stating the above facts). According to the evidence for the plaintiff, a passenger car set apart for colored passengers, as provided by law, was invaded by a drunken person, who was guilty of violent conduct, terrorizing the occupants of the car, and compelling the plaintiff to leave his seat and ride on the platform, while the conductor remained idly by and neither protected the passengers nor arrested or ejected the offender. The evidence of the conductor, which is partly copied in the statement of facts, shows how mildly he dealt with the boisterous passenger. A railroad company is bound to use extraordinary care and diligence to protect its passengers, while in transit, from violence, injury, or outrage and humiliation by third persons. *Brunswick & Western R. Co. v. Ponder*, 117 Ga. 63, 43 S. E. 430, 60 L. R. A. 713, 97 Am. St. Rep. 152. This duty applies to whether the passenger is white or colored. "This protection must be afforded by the conductor to the extent of all the power with which he is clothed by the company or by the law, and his failure to afford it, when he has knowledge that there is occasion for his interference, will subject the company to liability in damages." *Richmond & Danville R. Co. v. Jefferson*, 89 Ga. 554, 16 S. E. 69, 17 L. R. A. 571, 32 Am. St. Rep. 87. Conductors are clothed with police powers, and authorized to stop the train where the offense is committed, or at the next stopping place, and eject a passenger who is guilty of disorderly conduct, or of using obscene, profane or vulgar language or gaming on the train, and he may cause the offender to be detained and delivered to the proper authorities for trial as soon as practicable. Pen. Code, 1895, § 902. "With or without a ticket, a passenger has no right to remain on a train and be carried when he is disorderly, or uses any obscene, profane, or vulgar language." *Peavy v. Georgia R. Co.*, 81 Ga. 485, 8 S. E. 70, 12 Am. St. Rep. 334. It is evident that the conductor's own testimony made but a scant excuse for not protecting the plaintiff from being threatened, humiliated, and placed in danger by a drunken passenger, if indeed it amounted to an excuse at all.

The presiding judge did not present the issues in this case with his usual ability and clearness. If, in the charge to the effect that a conductor would not be justified in expelling from the train a passenger of known bad and turbulent character "so long as such person was not guilty of conduct seriously annoying or dangerous to other passengers," the word "seriously" is to be construed as qualifying both the words "annoying" and "dangerous," the charge was clearly erroneous. A passenger does not have to be in serious danger before the duty of the conductor to protect him arises. If that word is to be considered as qualifying the word "annoying" only, it is still of doubtful propriety. In *Pittsburgh, Cincinnati & St. Louis R. Co. v. Vandyne*, 57 Ind. 576, 26 Am. Rep. 68, it is said: "A railroad company may refuse to receive and carry as a passenger any

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person who is so intoxicated as to be disgusting, offensive, disagreeable, or annoying, as long as he continues in that condition, though he may have purchased a ticket entitling him to passage. Slight intoxication, such as would not seriously affect the conduct of the passenger, will not justify a railroad company in refusing to receive and carry him." Here the word "seriously" is used with respect to the effect on the conduct of the intoxicated passenger, not as holding that his conduct must be seriously annoying or dangerous to other passengers. Of course, mere trivial annoyance, or such as would not arise to a reasonable person, but only to the supersensitive or fastidious, would not fall within the rule. It must be substantial, not trivial. The illustration of counsel for defendant of a child who cries or a man who snores is not apt. These are innocent, natural acts. The annoying conduct of a drunkard or rowdy is a voluntary wrong, or one resulting from his voluntary act. The writer can conceive, however, of snoring, or even laughter, which might assume such abnormal proportions and become so loud and prolonged that the sleeper should be waked or the guffaw checked in the interest of other passengers, especially if the unusual noise resulted from drunkenness. On page 579 of 57 Ind. (26 Am. Rep. 68) of the authority above cited it is said: "A person so drunk as to be likely to violate the common proprieties, civilities, and decencies of life has no right to a passage while in that condition. The comfort and convenience of passengers must be protected, their opinions and feelings regarded, and proper decorum observed, and although, in a railroad passenger car, neither the highest breeding of the drawing-room nor the fastidious delicacy of the parlor is required, yet the behavior of all persons therein should be becoming to the place and the general character of the passengers." See, also, *Pittsburgh & Connellsville Railroad Co. v. Pillow*, 76 Pa. 510, 18 Am. Rep. 424; *Flint v. Norwich & N. Y. Co.*, 34 Conn. 554, Fed. Cas. No. 4,873; *Pittsburgh and Fort Wayne Railway Co. v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224; *Murphy v. Union Ry. Co.*, 118 Mass. 228; *Jencks v. Coleman*, 2 Sumn. 221, Fed. Cas. No. 7,258. As to the care due to an intoxicated passenger who has been taken on board and is proceeding on his journey, see *Milliman v. New York Central Ry. Co.*, 66 N. Y. 643; *Brown v. Memphis & Charleston R. Co.*, 1 Am. & Eng. R. C. 247.

Railroads doing business in this state are required by its statutes to furnish "equal accommodations, in separate cars, or compartments of cars, for white and colored passengers," and it is also declared that "the officers or employees having charge of such railroad cars shall not permit white and colored passengers to occupy the same car or compartment, and a violation of this section shall be a misdemeanor." Pen. Code 1895, §§ 526, 529. "The conductor and any and all employees on such cars have power to eject from the train or car any passenger who refuses to remain in such car or compartment or seat as

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may be assigned to him." Pen. Code 1895, § 528. See, also, Civil Code 1895, § 2270 et seq. The plaintiff expressly alleged that Scruggs, a white passenger, was drunk and disorderly; that he went into the car set apart for colored people, where he had no right to be, and where the plaintiff was rightfully and quietly seated, and, without any cause or provocation, began a violent assault upon the plaintiff, threatening and cursing him; that he drew a pistol, threatened to shoot the plaintiff, and drove the latter out of his seat and out of the car; and that all of this was in the presence of the conductor, whom the plaintiff continued to ask to protect him, but who failed and refused to do so. This was denied by the defendant in its answer. In his charge to the jury the presiding judge made no reference whatever to the very material issue as to the place where the alleged assault took place, or whether Scruggs was allowed to remain in a car where he had no lawful right to be, and to assault the plaintiff who was lawfully there, or there to commit the other acts complained of. Whether the plaintiff was lawfully in that car, and Scruggs was unlawfully there, and was permitted to remain there and to so act as to drive the plaintiff from his seat or necessitate his leaving it, was a material issue in the case, and it was error to omit altogether any reference to it. If Scruggs had no right to be at that place, and the plaintiff did have such a right, the conductor should have dealt with the situation with the requirements of the law in view.

It is contended, on behalf of the defendant in error, that the only damages claimed are based on the assault or threatened assault, and not upon a violation of the statute in reference to separation of races, the reference to the fact that Scruggs was in the car set apart for colored people being merely incidentally mentioned. A reading of the allegations on this subject, which are, in effect, stated above, will show that they were not incidental, but material and substantial. In a later portion of the declaration, in setting out the alleged negligence of the defendant, it is stated, among other things, "that the defendant in all the particulars aforesaid failed to exercise extraordinary care to protect the person of the plaintiff, who was its passenger on its train, but exposed the person of the passenger to danger by its negligence."

The charge that "if a passenger is guilty of boisterous and improper conduct but desists from it after request or remonstrance or command of the conductor, the conductor would not be justified in expelling him from the train after he had so desisted," is not an accurate, concrete statement of the law applicable to the facts disclosed by the evidence in this case. It omits entirely any consideration of the question as to whether the conductor made a request or remonstrance or command in due time and in the proper manner for the protection of other passengers. *Savannah, Florida & Western R. Co. v. Boyle*, 115 Ga. 836, 42 S. E. 242, 59 L. R. A. 104. Moreover, if Scruggs

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was in a place where he had no lawful right to be, and the conductor permitted him to remain there, with a pistol in his hand, to the exclusion of the passengers who had a right to be there, this could hardly be called a desistance from the improper conduct. In *Pittsburgh, Fort Wayne & Chicago Railway Co. v. Hinds*, 53 Pa. 517, 91 Am. Dec. 224, supra, Woodward, C. J., in speaking of a conductor who failed to use proper efforts to suppress riotous conduct on the train, said: "Nor did his exhortation to the passengers to throw the fighters out come up to the demands of the hour. He should have led the way, and no doubt passengers and hands would have followed his lead."

Judgment reversed. All the Justices concur.

BOWDEN v. ATLANTIC COAST LINE R. CO.

(Supreme Court of North Carolina, Feb. 26, 1907.)

[56 S. E. Rep. 558.]

Carriers—Arrest of Passenger—Aiding Officers—Sufficiency of Evidence.—Evidence that on demand of police officers who were endeavoring to arrest plaintiff, a passenger on defendant's train, defendant's conductor instructed the train porter to deliver to such officers the key to a water-closet, wherein plaintiff had locked himself, without the conductor's knowledge, bolting the door on the inside, so that the key was of no avail, and that the train remained a few minutes longer at the station while the arrest was being made, did not show that the conductor aided the arrest.

Same—Resisting Officer—Duty of Conductor.*—It is not the duty of the conductor of a railroad train to resist a known officer of the law in arresting a passenger on the train.

Appeal from Superior Court, Craven County; Shaw, Judge.

Action by E. K. Bowden against the Atlantic Coast Line Railroad Company. Judgment for plaintiff, and defendant appeals. Reversed.

Action to recover damages for neglect in protecting plaintiff, a passenger on defendant's train. The court submitted the following issues: "(1) Was plaintiff a passenger of defendant company? Answer. Yes. (2) Did the defendant company through its agents and employees wrongfully aid, abet, or encourage a wrongful assault on the plaintiff, as alleged? Answer. Yes. (3) Did the defendant company neglect, fail, and refuse through its agents and employees to protect the plaintiff from a wrongful assault and insult as alleged? Answer. Yes. (4) What damages, if any, is plaintiff entitled to recover? Answer. \$500." From the judgment rendered, defendant appealed.

D. L. Ward and W. D. McIver, for plaintiff.

Simmons, Ward & Allen, for defendant.

*See foot-note appended to *Texas Midland R. R. v. Dean* (Tex.), 16 R. R. R. 596, 39 Am. & Eng. R. Cas., N. S., 596.

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BROWN, J. We think the motion to non-suit the plaintiff should have been allowed. We find in the record no evidence that defendant's servants were remiss in the discharge of any legal duty imposed upon them in respect to the plaintiff. The entire evidence tends to prove that plaintiff "ran away" with a 16 year old girl for the purpose of marrying her, and they were passengers on defendant's train. The brother of the girl telegraphed to the chief of police of Jacksonville, N. C., to arrest the couple, stating that they had eloped. The moment the train arrived the chief and his assistant, fully armed, boarded the train to make the arrest. The plaintiff, apprehending arrest, had gone in the water-closet without the knowledge of the conductor and bolted the door on the inside. The officers demanded the key of the conductor, who instructed the porter to give it up. The key was of no avail, so the officer presented his pistol through the window of the closet and compelled plaintiff to unbolt the door and surrender. The officers took the couple off the train. The conductor then proceeded on his journey, the train having been detained a few minutes longer than usual because of the difficulty of the officers in arresting the plaintiff. The conductor knew the chief of police and that he was an officer of the town of Jacksonville. We see nothing in the evidence which tends to prove that the conductor aided, abetted, or encouraged the arrest of plaintiff. The key to the closet was surrendered only upon the demand of the chief of police, who was evidently prepared to execute his purpose by force. As plaintiff had concealed himself in the closet without the knowledge of the conductor and bolted the door on the inside, the surrender of the key is no evidence of a purpose to actively aid and abet the officers. The fact that the train remained at the station a few minutes longer than usual was almost unavoidable under the circumstances, and is no evidence that the conductor had aligned himself with the officers to aid them in making the arrest. The most that can be said is that the conductor did not resist the officers in executing their purpose to arrest plaintiff. It is not the duty of a conductor to resist a known officer of the law in making an arrest.

In a case very much like this which seems to have escaped the vigilance of the astute counsel, this court has said: "It would be vain and unreasonable to require the conductor to resist a known officer of the law from making an arrest." *Owens v. Railroad*, 126 N. C. 139, 35 S. E. 259, 78 Am. St. Rep. 642. It is not intended that railroad trains and stations shall become "cities of refuge" for persons charged with crime, nor will the law impose upon the agents of the company the duty to pass judgment upon the right of a known officer of the law to make an arrest.

We think the case above cited is clearly decisive of this, and we direct that the motion to nonsuit be allowed. *Hollingsworth v. Skelding*, 142 N. C. —, 55 S. E. 212.

Reversed.

ST. LOUIS & S. F. R. CO. v. WELLS.

(Supreme Court of Arkansas, Jan. 21, 1907.)

[99 S. W. Rep. 534.]

Carriers—Live Stock—Limitation of Liability—Validity of Contract.*—A contract limiting a carrier's liability for damages to a live stock shipment is void where the agent tells the shipper that he could make no other kind of a contract.

Same—Evidence—Contradictory Recitals in Contract.†—Where a contract limiting the carrier's liability for damages to a shipment is extorted from the shipper by a refusal to ship on any other terms, he may show the falsity of recitals in the contract that opportunity was given him to ship on more favorable terms, but that he elected to accept the restrictive contract upon a lower rate.

Same—Contract—Sufficiency of Evidence.—Evidence, in an action for the negligent killing of an animal by a carrier, held sufficient to sustain a finding that the shipper was denied an opportunity to ship under a contract not limiting the liability of the carrier.

Same—Effect of Statute.—The rule that no presumption of the carrier's negligence arises from the injury of live stock in transportation where, in accordance with the contract, the shipper accompanies the shipment, is not altered by Act March 26, 1895, p. 64, c. 51 (Kirby's Dig. § 6700), requiring carriers to furnish shippers of poultry and live stock free transportation to and from the destination.

Appeal—Harmless Error—Instruction—Error Cured by Verdict.—Though it was error to instruct that negligence of the carrier would be presumed from the injury of an animal while being shipped, where the shipper was required, under the contract, to accompany the shipment, the error was harmless where the jury, in finding generally for the shipper, necessarily found against the validity of the contract.

Battle, J., dissenting.

Appeal from Circuit Court, Washington County; J. S. Maples, Judge.

Action by R. T. Wells against the St. Louis & San Francisco Railroad Company. From a judgment for plaintiff, defendant appeals. Affirmed.

L. F. Parker and B. R. Davidson, for appellant.

E. S. McDaniel, for appellee.

MCCULLOUGH, J. This is an action against appellant railroad company, to recover the value of a jack, alleged to be of the value of \$240, shipped over defendant's line from Fayetteville to Van Buren, Ark., there to be delivered to a connecting carrier. It is alleged in the complaint that, by reason of negligence of defendant's employee in the operation of the train, the jack was killed while in transit and before arrival at Van Buren. The action was commenced more than a year after the shipment and

*See foot-notes appended to *Murphy v. Wells-Fargo & Co.* (Minn.), 21 R. R. R. 315, 44 Am. & Eng. R. Cas., N. S., 315; foot-notes appended to *Arthur v. Texas & P. Ry. Co.* (C. C. A.), 17 R. R. R. 17, 40 Am. & Eng. R. Cas., N. S., 40.

†See foot-notes appended to *Gerry v. American Exp. Co.* (Me), 21 R. R. R. 677, 44 Am. & Eng. R. Cas., N. S., 677; foot-notes appended to *Carpenter v. Baltimore & O. R. Co.* (Del. Supr. Ct.), 20 R. R. R. 679, 43 Am. & Eng. R. Cas., N. S., 679.

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death of the jack. The defendant filed an answer denying that its servants were guilty of any negligence, or that the jack was injured while in transit. As a further defense the written contract for shipment entered into between plaintiff and defendant limiting the liability of the carrier in consideration of reduced rates for transportation was set forth and pleaded, and it was alleged that, by the terms of said contract, it was stipulated, among other things, that, in the event the jack should be damaged or killed, the liability of the carrier for the damage should not exceed the value stated in the contract, \$100, and that no action against the defendant to recover damages should be maintained unless commenced within six months next after the cause of action should have accrued. The contract was introduced in evidence and it contained the stipulations named above as well as further recitals to the effect that the company offered the shipper two rates on shipments of live stock, and that the shipper elected to accept the reduced or lower rate under a contract limiting the liability of the carrier. The plaintiff testified that, before he signed or accepted the contract, he asked the agent of the company if he had any other contract, and the latter replied in the negative, and that he accepted the contract because he could secure no other. This was contradicted by the agent, who testified that the higher rates on all shipment of live stock, according to value, under bills of lading or contracts containing no limitation of the carrier's liability, were allowed by the company; that he had no other printed form of contract prepared for shipments of live stock, but that he could, by interlineation, etc., alter an ordinary bill of lading containing no limitation of liability so as to provide another form of live stock contract, whenever a shipper elected to accept a higher rate under such contract. The jury returned a verdict in favor of the plaintiff, assessing the damage at the sum of \$267.08, and the defendant appealed.

It is contended on behalf of appellant that appellee was bound by the contract limiting the liability of the carrier even if he was denied the benefit of any other contract or rate, and that the recitals of the contract to the effect that he had elected to accept it in consideration of the reduced rate precluded him from proving that the company's agent had refused to give him any other contract or rate. This court held in *Railway Co. v. Cravens*, 57 Ark. 112, 20 S. W. 803, 18 L. R. A. 527, 38 Am. St. Rep. 230, that (quoting the syllabus) "a carrier, cannot, by special contract, limit its common-law liability for losses not occasioned by its own negligence where it does not afford the shipper an opportunity to contract for the service required without such restriction, and it is immaterial that the shipper knowingly accepted a bill of lading containing such restriction, without demanding a different contract, if he knew that the carrier's agent had no authority to make any other contract with him." In the case at bar the undisputed evidence is that the carrier had another rate to offer the shipper, and the contract

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recited that fact, but there is evidence tending to show that the local agent refused to give the shipper the opportunity to make any other contract than one restricting the liability of the carrier. Now, it matters not how many different rates or forms of contract the carrier is willing to give to the shipper, if the local agent with whom the latter deals denies him the opportunity to take advantage of the more favorable contract on a higher freight rate, or, what amounts to the same thing, informs him that there are no other terms or conditions upon which he can have his property transported, then there is, in fact, no opportunity afforded to contract for shipment on unrestricted terms and the restrictions are void. The contract for a limited liability of the carrier must be based upon the consent of the shipper upon a valid consideration, and, no matter what the contract contains by way of recitals or stipulations, if no opportunity for unrestricted service is afforded, then it is imposing the restricted contract upon the shipper without his consent. If no opportunity for shipment on other terms was, in fact, given, then the recitals of the contract were false in stating that such opportunity had been given, and that the shipper had elected to accept a restrictive contract upon a lower rate. If the contract was, in fact, extorted from the shipper by a refusal to transport his property upon any other terms, he was not bound by false recitals which it may have contained. No rule of evidence was violated in permitting him to show the falsity of such recitals. Mr. Justice Hemingway in delivering the opinion of the court in the *Cravens Case* said: "But it is said that, if the party knowingly consents to a special contract, no one else can object, and that he cannot be heard to say that it was unfair or that an advantage was taken of him, since he acted freely and intelligently. This, as we have seen, is a mistake, for such contracts affect the interests of the public and are subject to public regulation, and besides, the circumstances do not warrant the assumption of fact that the party consented freely, but rather show that he submitted to terms that he was bound to accept, when the other party deprived him of the opportunity to choose between them and the contract which the law entitled him to demand, for he was, as we have seen, as much entitled to be indemnified against loss in transit as to the service demanded. The law imposes no necessity for an election between the two rights, and the carrier can impose none. But the carrier refused to perform the service without a release which the law gives, and forces an election between rights which are not inconsistent." It may be said that, inasmuch as a railway company can generally deal with the shipper only through its local agents, and, when it has prescribed different just rates for shipments upon different terms, the application of this rule would deprive the company of the power to enforce its contracts and make the validity of its contracts for shipment depend upon oral proof in each case as to what transpired between the

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shipper and the local agent. So it may, but, on the contrary, any other rule would allow the company to extort from the shipper a contract without his consent, by reciting in the written instrument that he had been offered other terms and had exercised his choice. When the special contract was found to be invalid, all question as to the limitation as to value of the property and the time for bringing the action passed out of the case. *Railway Co. v. Coolidge*, 73 Ark. 112, 83 S. W. 333, 67 L. R. A. 555, 108 Am. St. Rep. 21; *Railway Co. v. Marshall*, 74 Ark. 597, 86 S. W. 802.

It is also contended that the evidence was insufficient to warrant the jury in finding that the plaintiff applied to the agent for the privilege of shipping upon different terms and was denied the opportunity. The plaintiff testified that, to the best of his recollection, he asked the agent or employee with whom he dealt, and who prepared and signed the contract, for another contract, and that he received a negative reply; that he had no other alternative but to accept this contract. This was denied by the agent or employee in question, and, as already stated, it was conclusively shown that another rate had been prescribed for shipments on unrestricted terms, but that question was submitted to the jury, and we think there was sufficient evidence to sustain the finding.

The court, over the defendant's objection, gave the following instruction which is assigned as error, viz.: "(1) If the jury find that the defendant received the jack for shipment and the same was killed while in the defendant's car, the presumption is that such killing resulted from the negligence of the defendant, or its servants, in the operation of its locomotive or cars." This instruction was erroneous, for the reason that it left entirely out of consideration the contract between the parties for the shipment of the stock. By the terms of the contract the shipper was required to accompany the shipment of live stock and be in sole charge of it for the purpose of attention and care of it. It further provided that the carrier should not be responsible for attention to, and care of, the stock, but should only be liable for actual negligence of its employees in the transportation of the freight. If the contract was in force, which was a disputed question, then the defendant was not liable unless its employees were guilty of negligence, and, where the shipper accompanied the car and had charge of the live stock, there was no presumption of negligence arising merely from the death of the animal. *St. L., I. M. & So. Ry. Co. v. Weakly*, 50 Ark. 397, 8 S. W. 134, 7 Am. St. Rep. 104. In that case the court said: "Having the care of the stock, the liability of a common carrier, which makes it his duty to account for the loss of freight, did not devolve on appellant. Being in charge, they (the shippers) were presumed to know the cause of the loss of the jack found dead, if either party to the contract does, and the burden of proof is upon them to show that the default or negligence of

appellant was the cause before they can be entitled to recover." Counsel for appellee contends that the rule announced in that case is changed by the act of March 26, 1895 (Kirby's Dig., § 6700), requiring railroad companies, when they receive shipments of poultry or live stock by the car load, to furnish to the shipper or his employee free transportation to and from the point of destination. We do not think that this statute changes the rule at all. It only makes it compulsory upon the carrier to furnish free transportation to the shipper for himself or employee when the shipment is in car load lots. The statute does not undertake to change the liability of the carrier in any other particular or to alter the rules of evidence respecting the establishment of its liability. Whilst the instruction just quoted is an erroneous statement of the law, it was not prejudicial in this case. The jury, in arriving at a verdict in favor of the plaintiff for the sum named, necessarily found against the validity of the contract, for the court instructed them, at the request of the defendant, that, if they found the shipper had notice of the two rates fixed by the company and chose the lower rate, then the contract was binding on him; the cause of action was barred by limitation, and he could not recover. The jury could not, under the instructions given by the court, have found for the plaintiff for a sum in excess of \$100 without first finding that the contract was not in force. So, treating this question as eliminated by the verdict of the jury, the instruction now under consideration was harmless. It told the jury, in substance, that, if they found that the jack was killed in the car while being transported by defendant, a presumption of negligence on the part of the defendant arose. This is not a correct statement, as we have already seen. But, with the special contract out of consideration, the carrier was liable as an insurer of the safe transportation and delivery of the freight; it was responsible for all losses except those occasioned by the act of God or the public enemy, and when it appeared that the animal was killed while in transit, it devolved upon the carrier, in order to exonerate itself from liability, to show that the loss resulted from one of those causes. *St. L., I. M. & So. Ry. Co. v. Weakly*, supra. In the absence of a special contract limiting the liability of the carrier, it is responsible as an insurer, and the burden is not upon the plaintiff, in an action to recover for loss or damage, to show that the same did not result from the act of God or the public enemy.

We find no prejudicial error in the record, and the judgment is affirmed.

BATTLE, J., dissents.

MILHOUS *v.* ATLANTIC COAST LINE R. CO.

(Supreme Court of South Carolina, Oct. 24, 1906.)

[55 S. E. Rep. 764.]

Damages—Notice of Special Circumstances—Carriers—Delay of Baggage.*—In an action by a passenger for delay in the delivery of baggage containing dental tools, the passenger cannot recover damages for what he would have made by working at his profession, the patients being present during the time of delay, without allegation and proof of notice to the carrier of the special circumstances under which such special damages are claimed.

Appeal from Common Pleas Circuit Court of Barnwell County; Purdy, Judge.

Action by J. H. E. Milhous against the Atlantic Coast Line Railroad Company. Judgment for plaintiff before a magistrate was affirmed in the circuit court, and defendant appeals. Reversed and remanded.

Robert Aldrich, for appellant.

G. M. Green, for respondent.

JONES, J. The plaintiff sued the defendant company before C. W. Moody, a magistrate for Barnwell county, to recover damages for delay in delivering certain baggage, consisting of four grips, which defendant had engaged to transport for him, as passenger, from Barnwell, S. C., to Dunbarton, S. C., on the 13th day of September, 1905. The baggage went on the same train as plaintiff and by mistake was carried beyond the proper station, but was returned on the next train and delivered to plaintiff at Dunbarton, after a delay of 3 hours and 20 minutes. Plaintiff is a dentist, and the baggage contained a part of his dentist machine, called an "engine," but it was not claimed nor does it appear that the defendant company had any knowledge or notice of this. Plaintiff, as appears by his letter to defendant, dated September 15, 1905, and introduced in evidence by defendant, made demand on defendant for damages to the amount of \$20, claiming that his time on that trip was worth \$6 per hour, and that on account of delay and lost time he did not finish the work of some school children who were going away to college, which work he consequently lost. In his complaint before the magistrate, plaintiff demanded \$100 damages, alleging the loss of time before mentioned as the result of the gross carelessness, willfulness and wantonness of the defendant company in failing to deliver the baggage promptly. The de-

*See foot-note appended to *Choctaw, etc., R. Co. v. Jacobs* (Okl.), 21 R. R. R. 761, 44 Am. & Eng. R. Cas., N. S., 761; foot-notes appended to *Illinois Cent. R. Co. v. Holt* (Ky.), 21 R. R. R. 455, 44 Am. & Eng. R. Cas., N. S., 455; foot-notes appended to *Turner v. Southern Ry. (S. Car.)*, 21 R. R. R. 288, 44 Am. & Eng. R. Cas., N. S., 288.

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defendant company made a general denial, but in court, before entering upon the trial, offered to allow judgment to be taken against defendant for \$1 and costs, which offer was refused. On the trial, over defendant's objection to its relevancy, plaintiff was allowed to testify that the time he lost by the delay was worth \$6 per hour, basing the value of his time by the work he did while at Dunbarton on that trip, and the loss of work by the delay. Defendant moved for a nonsuit on the ground that loss of profits in business, or special damages, could not be considered in this case. The magistrate gave judgment for \$20, and defendant appealed to the circuit court, alleging error (1) in basing judgment upon what plaintiff could have earned had his baggage been put off with him; (2) that there was no evidence of willfulness; (3) that there was no evidence of such injury or loss as the law takes into consideration.

Judge Purdy made the following decree: "There is no basis for punitive damages in this case. Failure to put off the implementations of the plaintiff was wholly an inadvertence, cured immediately on discovery, but occasioned a delay of 3 hours and 20 minutes. The plaintiff claims damages for loss of time at \$6 per hour, and states that his time was worth that much on that occasion, and that the subjects or clients were present, and had to leave to go off to school, thereby depriving him of the opportunity to do the work. In his complaint he bases his damages on 'lost time,' and there was no motion to make definite and certain the statements or elements of damages beyond this. There was no objection to the testimony upon the ground that no special damages were alleged, but on other grounds. "There was no cross-examination to probe the witness and get names of patients deprived of his services, names of parties for whom he performed services, and amounts deprived of, and earned, respectively, but the statement stands unchallenged that he lost 3 hours and 20 minutes, and that on that occasion he was earning \$6 per hour. If the magistrate gave judgment for anything, \$20 under this showing was the amount that the plaintiff was entitled to be paid. If it be said that this is excessive, there is no proof upon which to base a reduction, nor is interference with the judgment sought on this ground, but primarily on the right of the plaintiff to recover at all. The case of *Mood v. Telegraph Company* recognizes the right to recover special damages. See that case 40 S. C. 524, 19 S. E. 67. I express no opinion as to the earning capacity of the plaintiff other than that appearing in the record, and from that testimony, not contradicted or impeached, the judgment of the magistrate is sustained and the exceptions are overruled, and it is so ordered."

Defendant now excepts to this decree, alleging error. (1) In holding that plaintiff was entitled to recover for lost time, or what he could have earned in the time he was out of the use of his baggage. (2) In holding that special damages could be recovered, when none was alleged. (3) In holding that special

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damages could be recovered, when no notice that such loss would be sustained was given, alleged, or proved. (4) In that dental instruments are not baggage, and the profits to be derived from their use are speculative and remote. (5) In not sustaining defendant's ground of appeal from the magistrate's court as stated.

After consideration, we are of the opinion that the circuit court was in error. For the purpose of this appeal we will assume, without deciding, that a reasonable amount of dental tools may be regarded as baggage of a passenger, who is a dentist, and carrying them for personal use. Such is probably the law, as indicated in *Davis v. Railroad Co.*, 10 How. Prac. (N. Y.) 330; *Porter v. Hildebrand*, 14 Pa. 129; *Kansas City, etc., Co. v. Morrison*, 34 Kan. 502, 9 Pac. 225, 55 Am. Rep. 252. It is not claimed that any direct injury resulted to the baggage by reason of the delay, nor that plaintiff was otherwise damaged or inconvenienced than by the loss of what he would have earned during the delay if the dental instruments had been delivered in due time. There is nothing reported in the evidence which tends to show that this particular portion of his baggage was so essential to his usual occupation that his time was absolutely lost, or to show what was the ordinary and usual value of 3 hours and 20 minutes of his time. The claim for damage rests upon the special circumstances which rendered the use of the tools valuable to plaintiff, and falls within the class of special damages. This court has, in several cases recently, considered the subject of special damages, and the rule is settled that, in order to recover such damages, the plaintiff must allege and prove notice to the carrier of the special circumstances. *Traywick v. Southern Ry.*, 71 S. C. 85, 50 S. E. 549; *Wesner & White v. Atlantic Coast Line Ry.*, 71 S. C. 211, 50 S. E. 789; *Guess & Glover v. Southern Ry.*, 73 S. C. 264, 53 S. E. 423; *Wehman v. Southern Ry.*, 74 S. C. 286, 54 S. E. 360. As there was no allegation or proof of such notice to the carrier, it is clear that the plaintiff was not entitled to recover such special damages.

The judgment of the circuit court and of the magistrate's court is reversed, and the case remanded to the magistrate court for a new trial.

GARY, A. J. As the law does not provide for an appeal from a magistrate to the Supreme Court, this court should not undertake to act directly upon a judgment rendered by a magistrate, but should remand the case with proper instructions to the circuit court.

BRADBURN *v.* WHATCOM COUNTY RY. & LIGHT CO. *et al.*

(Supreme Court of Washington, March 8, 1907.)

[88 Pac. Rep. 1020.]

Carriers—Free Passes—Violation of Law—Injury to Passengers—Liability.—A street railroad carrying a police officer free of charge as required by a municipal ordinance is liable for injuries sustained by him through the negligence of its motorman in charge of the car, though the ordinance is in conflict with Const., art. 2, § 39, and article 12, § 20, prohibiting the granting of passes to officers.

Appeal from Superior Court, Whatcom County; Jeremiah Neterer, Judge.

Action by W. E. Bradburn against the Whatcom County Railway & Light Company and another. From a judgment of dismissal, plaintiff appeals. Reversed, and remanded for new trial.

E. J. Grover, for appellant.

Newman & Howard, for respondents.

RUDKIN, J. This is an appeal from a judgment of nonsuit directed upon the complaint and the opening statement of counsel. The facts, so far as deemed material on this appeal, are as follows: The respondent Whatcom County Railway & Light Company was a corporation engaged in the business of operating a street railway in the city of Bellingham, and, as such, was a common carrier of passengers. The defendant Lewis was a motorman in the employ of the defendant company. Under the terms of the franchises heretofore granted to the company by the cities of Whatcom and Fairhaven, and now in force in the city of Bellingham, the company agreed to carry policemen and certain other officers of the city over its lines, free of charge, while riding on strictly city business. The appellant at the time of receiving the injuries complained of was a policeman in the employ of the city of Bellingham, and, as such, was riding on one of the company's cars on strictly city business. As he was about to alight from the car, he received certain personal injuries through the alleged negligence of the defendant motorman in charge of the car. This action was brought to recover damages for the injuries thus received.

The foregoing facts appearing from the complaint and the opening statement of counsel, the respondents moved for a judgment of dismissal upon the grounds (1) that the complaint did not state facts sufficient to constitute a cause of action; and (2) that it affirmatively appeared that the appellant was being carried at the time of receiving the injuries complained of by virtue of an illegal contract. In support of this motion and the ruling of the court granting the same, the respondents cite section 39 of article 2, and section 20 of article 12 of the state Constitution, which are as follows:

"Sec. 39. Free Transportation to Public Officers Prohibited.—It shall not be lawful for any person holding public office in this

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state to accept or use a pass or to purchase transportation from any railroad or other corporation, other than as the same may be purchased by the general public, and the Legislature shall pass laws to enforce this provision."

"Sec. 20. Prohibition Against Free Transportation for Public Officers.—No railroad or other transportation company shall grant free passes, or sell tickets or passes at a discount, other than as sold to the public generally, to any member of the Legislature, or to any person holding any public office within this state. The Legislature shall pass laws to carry this provision into effect."

And contend (1) that a policeman is an officer within the purview of these constitutional provisions; (2) that the provisions of the municipal ordinances are violative of both the letter and the spirit of the Constitution and contravene public policy; (3) that the respondents are not estopped to urge the invalidity of the ordinances; and (4) that the constitutional provisions quoted are self-executing. In answer to this, the appellant contends, among other things, that inasmuch as he was accepted as a passenger under and by virtue of the ordinances, it is immaterial whether the ordinances are valid or invalid. In view of the conclusion we have reached on this last proposition we deem it unnecessary to consider or decide the other questions discussed. The right of a passenger to maintain an action to recover damages for injuries received through the negligence of the carrier does not depend upon the existence of a valid contract for carriage. He may doubtless maintain an action *ex contractu* for breach of the contract to carry safely, but he may also maintain an action *ex delicto* for the breach of duty. Hutchinson on Carriers (2d Ed.) § 790. "It is enough that the person is being lawfully carried as a passenger to entitle him to all the care which the law requires of the passenger carrier; and the same vigilance and circumspection must be exercised to guard him against injury when he is carried gratuitously, as upon what is known as a free pass, or by the carrier's invitation, as a free pass, or by the carrier's invitation, as when he pays the usual fare. The leading case upon this point is that of the Philadelphia & Reading Railroad Company v. Derby, in which it appeared that the president of one railroad company had invited that of another to take a ride upon the road of the former. This invitation was accepted, and, during the ride, the invited president was injured by a collision upon the road, caused by the negligence of its agents, for which he sued the road. It was urged, on behalf of the defendant road, that no damages could be recovered for an unintentional injury by one who was, at the time, merely partaking of the hospitality of the defendant, and with whom there was no contract, either express or implied. But this defense was not sustained by the court, and it was held that the plaintiff, having been lawfully on the road at the time of the collision, none of the antecedent circumstances or

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accidents of his situation could affect his right to recover; and it was said that, independently of the question of contract, the defendant was under an obligation of duty to carry the plaintiff safely. This duty, it was said, does not result alone from the consideration paid for the service. It is imposed by the law, even when the service is gratuitous. The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it." *Hutchinson on Carriers*, § 566. "The carrier is liable to persons whom it accepts for transportation over its line, and from whom it demands no fare, to the same extent that it is liable to passengers who pay fare. A person riding on a free pass is as much a passenger as if he were paying full fare, and if the pass is given for a valuable consideration he is a passenger for hire. The fact that the carrier is prohibited by law from issuing free passes does not render a person a trespasser who travels upon such a pass unlawfully issued to him. If the pass is unlawful, the conductor should demand the regular fare, and his failure to do so will not make the traveler a trespasser, nor destroy his rights as a passenger." 5 *Am. & Eng. Ency. Law* (2d Ed.) pp. 507, 508. The foregoing statement of the rule is fully supported by the authorities. Thus in *Buffalo, etc., R. R. Co. v. O'Hara*, 9 *Am. & Eng. R. Cas.* 317, the plaintiff was injured while riding on a pass issued in violation of the Constitution of the state of Pennsylvania. This fact was urged as a defense. The trial court charged the jury as follows: "The defendant claims that the plaintiff cannot maintain this suit because she was not an employee of the defendant, and was traveling on a free pass issued in violation of law. We say to you that this is not a defense. Even if we adopt the presumption that Mrs. O'Hara was bound to know the law, she held a free pass signed by the superintendent of the road, countersigned by the foreman of the track section. The conductor of the train, whose peculiar duty is to determine the right of a passenger on his train, recognized her right to a seat under the pass, and, having done so, it is not for the defendant to urge that the pass was issued in violation of law."

In affirming the judgment in favor of the plaintiff the appellate court said: "If the free pass in this case was unlawful, the conductor should have demanded the regular fares, and his not doing so did not make O'Hara and his wife trespassers or destroy their rights as passengers." The respondents do not controvert the correctness of this rule of law, but maintain that the case was tried on a different theory in the court below, and should be tried on the same theory in this court. The theory upon which the case was tried below seems to have been the theory advanced by the respondents rather than by the appellant. They contended that the ordinances under which the appellant was being carried, free of charge, at the time of receiving his injuries, were null and void, and that by reason of their invalidity

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the appellant could not recover, and the court so ruled. For reasons already stated, this ruling was erroneous, and the respondents cannot avoid its effect by reference to any theories that may have been advanced or acted upon in the court below.

The judgment is reversed, and the cause remanded for a new trial.

HADLEY, C. J., and FULLERTON, CROW, and MOUNT, JJ., concur. DUNBAR and ROOT, JJ., not sitting.

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(Supreme Judicial Court of Massachusetts, Essex, Jan. 1, 1907.)

[79 N. E. Rep. 815.]

Carriers—Carriage of Passengers—Degree of Care.*—A carrier must use the highest degree of care, consistent with the nature of its business, not only to provide suitable vehicles for the carriage of its passengers, but to maintain such reasonable regulations as will protect its passengers against injuries caused by the misconduct of other passengers, which may be anticipated and be guarded against, and to employ a sufficient number of competent employees to meet any contingency which, in the exercise of a proper degree of care, it has reason to anticipate.

Same—Injury to Passengers—Negligence.†—Where, in an action against a carrier for injuries to a passenger by reason of the pushing of a crowd while attempting to enter a car at a station, there was evidence that there was usually a large crowd in the station at that time of day, and that there had been on many previous occasions the same struggle to get on the car as occurred at the time of the accident, and that the carrier ought to have

*For the authorities in this series on the question of the degree of care required of a carrier of passengers, see foot-notes appended to *Tri-City Ry. Co. v. Gould* (Ill.), 21 R. R. R. 758, 44 Am. & Eng. R. Cas., N. S., 758, foot-notes appended to *Moody v. Boston & M. R. R.* (Mass.), 21 R. R. R. 752, 44 Am. & Eng. R. Cas., N. S., 752; foot-notes appended to *St. Louis, etc., Ry. Co. v. Hatch* (Tenn.), 20 R. R. R. 782, 43 Am. & Eng. R. Cas., N. S., 782; *Alton Light & Traction Co. v. Oliver* (Ill.), 20 R. R. R. 33, 43 Am. & Eng. R. Cas., N. S., 33; *Hayne v. Union St. Ry. Co.* (Mass.), 19 R. R. R. 66, 42 Am. & Eng. R. Cas., N. S., 66.

For the authorities in this series on the subject of a carrier of passengers' duties and liabilities with respect to vehicles, see foot-notes appended to *Spooner v. Old Colony St. Ry. Co.* (Mass.), 19 R. R. R. 727, 42 Am. & Eng. R. Cas., N. S., 727; *Weinschenck v. New York, etc., R. R.* (Mass.), 19 R. R. R. 722, 42 Am. & Eng. R. Cas., N. S., 722.

For the authorities in this series on the subject of the duty of a carrier to protect its passengers against other passengers, etc., see foot-note appended to *McWilliams v. Lake Shore, etc., Ry. Co.* (Mich.), 21 R. R. R. 463, 44 Am. & Eng. R. Cas., N. S., 463; foot-note appended to *Ford v. Minneapolis St. Ry. Co.* (Minn.), 21 R. R. R. 182, 44 Am. & Eng. R. Cas., N. S., 182, foot-notes appended to *St. Louis, etc., Ry. Co. v. Hatch* (Tenn.), 20 R. R. R. 782, 43 Am. & Eng. R. Cas., N. S., 782.

†For the authorities in this series on the subject of the carrier's duties with respect to the reception of passengers, see foot-notes

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anticipated the happening of the accident, and ought to have taken reasonable precautions to guard against such injuries, the refusal to charge that there was no evidence of negligence of the carrier was proper.

Same.†—Where the crowding of the platforms and cars of a carrier at certain hours of the day was unavoidable in carrying on its business, the questions whether the carrier was bound to employ an increased number of men to prevent such crowding as involved danger to passengers, and whether it was reasonable to require such precaution, were for the jury.

Same—Contributory Negligence—Assumption of Risk—Questions for Jury.‡—Whether a passenger, injured while attempting to board a car at a station by reason of the jostling of a crowd, was guilty of contributory negligence or assumed the risk, in view of the fact that she had been in similar crowds before and had seen the same struggling and the same failure on the part of the carrier to control the crowd, was for the jury.

Same—Negligence—Evidence.—Where a carrier held out a station as a proper place for its passengers to go for the purpose of taking its cars, and the passengers had the right to regard themselves as having come to the station by its invitation, the carrier, though not controlling the station, but using it for his own benefit under an agreement with a lessee thereof, was liable to the passengers for injuries caused by defects in the rules regulating the use of the station, rendering the details of the agreement with the lessee inadmissible.

Exceptions from Superior Court, Essex County; Chas. U. Bell, Judge.

Action by Harriett F. Kuhlen against the Boston & Northern Street Railway Company. There was a verdict for plaintiff, and defendant brings exceptions. Overruled.

This was an action for injuries received by the plaintiff because of the pushing of a crowd while she was attempting to enter the rear vestibule of a car of the defendant at the subway station in Scollay Square, Boston. At the close of the testimony defendant requested the court to give the following instructions, which were refused:

“(1) On all the evidence the plaintiff is not entitled to recover.

“(2) The plaintiff was not in the exercise of due care.

“(3) There is no evidence of negligence of the defendant, its servants or agents.

“(4) The plaintiff assumed the risk of being jostled and all danger and inconvenience incident thereto when she entered into the crowd endeavoring to get upon the car.

“(5) In choosing to travel on a street car when the same

appended to *Waller v. Wilmington City Ry. Co.* (Del. Sup'r Ct.), 21 R. R. R. 727, 44 Am. & Eng. R. Cas., N. S., 727; foot-note appended to *Dieckmann v. Chicago & N. W. Ry. Co.* (Iowa), 19 R. R. R. 736, 42 Am. & Eng. R. Cas., N. S., 736; foot-notes appended to *Bennett v. Louisville Ry. Co.* (Ky.), 19 R. R. R. 730, 42 Am. & Eng. R. Cas., N. S., 730.

‡For the authorities in this series on the question whether it is contributory negligence in a passenger to board a crowded car, see foot-notes appended to *Alton Light & Traction Co. v. Oliver* (Ill.), 20 R. R. R. 33, 43 Am. & Eng. R. Cas., N. S., 33.

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was crowded, the plaintiff assumed the risk of injury incident to such crowding.

“(7) If it is not practicable for the defendant to carry on its business without the crowding of its platforms and cars at certain hours of the day, it is not negligence on the part of the defendant to fail to employ a large force of men at those hours to prevent jostling and crowding at the entrance to the cars.”

Frank D. Allen and Lyman K. Clark, for plaintiff.

Starr Parsons and H. Ashley Bowen, for defendant.

SHELDON, J. It is the duty of the defendant, as a carrier of passengers for hire, to use the highest degree of care consistent with the nature and extent of its business, not only to provide safe and suitable vehicles for their carriage, but to maintain all such reasonable arrangements for control and supervision both of the passengers and of its own servants as prudence would dictate to guard its passengers, while they occupy that relation, against all dangers that are naturally and according to the usual course of things to be expected. It is bound to select and employ a sufficient number of competent servants to meet any exigency which, in the exercise of that high degree of vigilance and care to which it is held, it ought reasonably to have anticipated. This is the unvarying doctrine of our own decisions. *Treat v. Boston & Lowell Railroad*, 131 Mass. 373; *Commonwealth v. Coburn*, 132 Mass. 555; *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311; *Dodge v. Boston & Bangor Steamship Co.*, 148 Mass. 210, 19 N. E. 373, 2 L. R. A. 83, 12 Am. St. Rep. 541. And its duty to use all proper means and precautions to protect its passengers against injuries caused by the misconduct of other passengers, such as under the circumstances might have been anticipated and could have been guarded against, is no less stringent than the obligation to prevent misconduct or negligence on the part of its own servants. *Simmons v. New Bedford, Vineyard & Nantucket Steamboat Co.*, 97 Mass. 361, 93 Am. Dec. 99; *Nichols v. Lynn & Boston Railroad*, 168 Mass. 528, 47 N. E. 427. “There is no doubt of the duty of a railroad company to use all such means and precautions as are reasonably practicable for the protection and safety of its passengers, not only from the misconduct of its agents and servants but also of other passengers and of other persons who are not passengers.” *Allen, J.*, in *Brooks v. Old Colony & Newport Railroad*, 168 Mass. 164, 165, 46 N. E. 566. In *United Railways v. Deane*, 93 Md. 619, 49 Atl. 923, 54 L. R. A. 942, 86 Am. St. Rep. 453, it was held in an elaborate opinion that a passenger on a street railway car could hold the railway company liable for an assault committed upon him by a drunken and disorderly passenger who had once been put off the car but afterwards had been allowed to get on again and ride without hinderance; and this upon the general ground that when the servants of a carrier know or have the means of

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knowing that a disorderly passenger is likely to commit an assault, it is their duty to eject him, as in *Vinton v. Middlesex Railroad*, 11 Allen, 304, 87 Am. Dec. 714, and their employer is liable for their neglect of this duty if it results in injury to another passenger. McSherry, C. J., said in this case: "It is just as incumbent upon a carrier to protect all his passengers from assault by a fellow passenger when his servants have knowledge or the means of knowing that an assault on some one is imminent, and when they have time and means to avert it, as it is to protect all his passengers from injuries likely to result from defective means or methods of transportation." The same general doctrine has been maintained in other jurisdictions, so far as we are aware without exceptions. *Muhlhouse v. Monongahela Street Railway*, 201 Pa. 237, 50 Atl. 937; *Pittsburg & Connellsville Railroad v. Pillow*, 76 Pa. 510, 18 Am. Rep. 424; *McGearty v. Manhattan Railway*, 15 App. Div. 2. 43 N. Y. Supp. 1086; *Pittsburgh, Ft. Wayne & Chicago Railroad v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224; *Flint v. Norwich & New York Transportation Co.*, 34 Conn. 554; *Id.*, 6 Blatchf. 158, Fed. Cas. No. 4,873; *Id.*, 7 Blatchf. 536, Fed. Cas. No. 4,874; *Id.*, 13 Wall. (U. S.) 3, 20 L. Ed. 556; *New Orleans, St. Louis & Chicago Railroad v. Burke*, 53 Miss. 200, 24 Am. Rep. 689. Other cases bearing on the same subject are cited by Loring, J., in *Jacobs v. West End Street Railway*; 178 Mass. 116, 118, 59 N. E. 639. The cases of *Thomson v. Manhattan Railway*, 75 Hun. 548, 27 N. Y. Supp. 608; *Putnam v. Broadway & Seventh Avenue Railroad*, 55 N. Y. 108, 14 Am. Rep. 190; *Ellinger v. Philadelphia, Wilmington & Baltimore Railroad*, 153 Pa. 213, 25 Atl. 1132, 34 Am. St. Rep. 697; *Graeff v. Philadelphia & Reading Railroad*, 161 Pa. 230, 28 Atl. 1107, 23 L. R. A. 606, 41 Am. St. Rep. 885, and *Cornman v. Eastern Counties Railway*, 4 H. & N. 781, relied upon by the defendant, either turn upon the proposition that as a common carrier can be held liable for injury done by one passenger to another only upon proof that it has failed to discharge its duty of using the utmost vigilance to maintain order and guard against violence, so it must be shown that the circumstances which called for special action either were known or in the exercise of proper care ought to have been known to the defendant or its servants, or else lay down the rule (perhaps sometimes carried too far) that the carrier is not to be held liable for a mere breach of courtesy from one passenger to another.

There was evidence that there was usually a large crowd in the subway station at this time of the day; that there had been on many previous occasions the same surging and struggling to get upon the car as occurred at this time; and the jury had a right to find, as under the careful instructions of the court they must have found, that the defendant and its servants ought to have anticipated just what actually did take place, and ought in the exercise of the necessary care to have taken reasonable pre-

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cautions to guard against such injuries as were caused to the plaintiff, and that they were negligent in failing to take such precautions and to give to the plaintiff that degree of protection which she had a right to expect from them. It follows that defendant's third request for instructions was rightly refused.

Nor could its seventh request have been given. It was for the jury to say whether or not, if the crowding of its platforms and cars at certain hours of the day was unavoidable in carrying on its business, that the high degree of care which it was bound to exercise called for the employment of an increased number of men to prevent such jostling and crowding at the entrance of the cars as would involve danger to passengers, and whether or not it was reasonable, in view of the nature and extent of the defendant's business, to require this precaution to be taken.

It could not have been said as a matter of law that the plaintiff herself was not in the exercise of due care, or that she had assumed the risk of the injury that was done to her. She had been in similar crowds before, had seen the same pushing and struggling and the same failure on the part of the defendant to control the assemblage; and she had formerly so narrowly escaped injury that she said in testifying: "Many a night I have almost got killed." With the knowledge gained by this experience, however, she joined in the general rush to get into the car. All these circumstances were important to be considered by the jury in passing upon the question of her due care; and their attention was called to these circumstances by the presiding judge in his charge. But they are not conclusive against her as matter of law. The jury might say that in spite of the failure of the defendant's servants and agents to control the crowd on previous occasions she might depend somewhat on the hope that they would not continue to fall short of their duty. And it is hard to see how the same circumstances which simply require the question of the defendant's negligence to be left to the jury can be conclusive as against the plaintiff to show either that she was negligent or that she assumed the risk. We think that these questions also were for the jury. *Treat v. Boston & Lowell Railroad*, 131 Mass. 371; *Simmons v. New Bedford, Martha's Vineyard & Nantucket Steamboat Co.*, 97 Mass. 367, 93 Am. Dec. 99; *Gaynor v. Old Colony & Newport Railroad*, 100 Mass. 208, 97 Am. Dec. 96. Accordingly the defendant's first, second, fourth and fifth requests could not have been given.

The subway and this station were built by the Boston Transit Commission, which alone had the power to make or authorize any change therein, and were the property of the city of Boston. The defendant's occupation thereof was either under a lease or merely permissive. St. 1894, p. 769, c. 548, § 23 et seq.; St. 1897, pp. 501, 506, c. 500, §§ 5, 12. See *Falkins v. Boston*

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Elevated Railway, 188 Mass. 153, 74 N. E. 338; Hilborn *v.* Boston & Northern Street Railway, 191 Mass. 14, 77 N. E. 646. For the purpose of showing the conditions of its occupation of the subway, the defendant offered in evidence a written agreement between the Boston Elevated Railway Company, the lessee of the subway, and the Lynn & Boston Railroad Company, to whose rights the defendant has succeeded; and the only remaining question arises upon the defendant's exception to the exclusion of this agreement, a copy of which is annexed to the bill of exceptions. The defendant refers to the fact that in the case last cited it appeared by the agreement of the parties "that the subway and the stations in it were constructed by the Boston Transit Commission and are owned by the city of Boston; that the platform at this station is now of the same width and in the same condition as constructed by the Transit Commission; that the Boston Elevated Railway Company operates its cars in the subway under a lease of the subway; and that the defendant operates its cars therein under permission of said elevated company authorized by the Legislature; that the elevated company has the entire management, charge and control of the subway, the stations and platforms, except that it can make alterations therein only by the permission of the Boston Transit Commission." Hilborn *v.* Boston & Northern St. Ry., 191 Mass. 14, 16, 17, 77 N. E. 646. The defendant contends that this agreement, if it had been admitted, would have proved in the case at bar the same facts which were agreed upon in that case, and claims that it had no control or management of the station and could not have limited the number of persons admitted thereto.

The main purpose of this agreement appears to have been to determine the amount of money to be paid by the defendant for its use of the subway, and to regulate the other pecuniary relations between the parties. The thirteenth clause however provides "that the cars of said Lynn & Boston Company while on the tracks of or leased to the Elevated Company either within the subway or without shall be subject to the rules and regularities (sic) of said Elevated Company and the reasonable direction of its officials." There was no offer to show what "reasonable directions," if any, had been given to the defendant or what rules, if any, had been established by the elevated company. Nor was there any offer to show that the defendant had not been given full power to make whatever police arrangements might be necessary for the proper supervision of any expected crowds of passengers; and if the defendant had such power, it could be held liable under the circumstances of this case. In view of the fact, which appears to have been conceded at the trial, that the defendant held this out as the proper place for its passengers to come to for the purpose of taking its cars, so that its passengers had a right to regard themselves as having come thither by its invitation, we do not see that the de-

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fendant was injured by the exclusion of this agreement. The general principle has been established that one who, though not strictly in control of a defective thing or dangerous place, yet uses it for his own benefit and for his own purposes invites another to enter it, may, if the other elements of liability concur, be held responsible to the latter for an injury caused by the defect or danger. *Heaven v. Pender*, 11 Q. B. D. 503; *Poor v. Sears*, 154 Mass. 539, 28 N. E. 1046, 26 Am. St. Rep. 272; *Carleton v. Franconia Steel & Iron Co.*, 99 Mass. 216, 218; *Cotant v. Boone Suburban Ry.*, 125 Iowa, 46, 99 N. W. 115, 69 L. R. A. 982. The details of this agreement do not appear to have been at all material to the issues raised at the trial. The effect of admitting the agreement might have been to distract the attention of the jury from the real issues of the case. We find no error at the trial.

Exceptions overruled.

ATCHISON, T. & S. F. RY. CO. v. CALHOUN.

(Supreme Court of Oklahoma, Feb. 13, 1907.)

[89 Pac. Rep. 207.]

Negligence—Imputed Negligence—Parent and Child.*—In an action by an infant of tender years, in its own right, for personal injuries arising from negligence of a railway company, the fault or negligence of its mother or a third party, if any, contributing to such injury, cannot be imputed to the child.

Carriers—Transportation of Passengers—Care Required.†—A com-

*For the authorities in this series on the subject of imputed negligence, see foot-note appended to *Kane v. Boston Elev. Ry. Co.* (Mass.), 20 R. R. R. 581, 43 Am. & Eng. R. Cas., N. S., 581; foot-notes appended to *Bresee v. Los Angeles Traction Co.* (Cal.), 20 R. R. R. 537, 43 Am. & Eng. R. Cas., N. S., 537; foot-notes appended to *Jacksonville Electric Co. v. Adams* (Fla.), 20 R. R. R. 295, 43 Am. & Eng. R. Cas., N. S., 295.

†For the authorities in this series on the question of the degree of care required of a carrier of passengers, see foot-notes appended to preceding case.

For the authorities in this series on the subject of the duties and liabilities of carriers with respect to discharging passengers, see foot-notes appended to *Moody v. Boston & M. R. R.* (Mass.), 21 R. R. R. 752, 44 Am. & Eng. R. Cas., N. S., 752, foot-notes appended to *Walker v. Wilmington City Ry. Co.* (Del. Sup'r Ct.), 21 R. R. R. 727, 44 Am. & Eng. R. Cas., N. S., 727; foot-notes appended to *Southern Ry. Co. v. Burgess* (Ala.), 21 R. R. R. 321, 44 Am. & Eng. R. Cas., N. S., 321; foot-notes appended to *Chicago, etc., Ry. Co. v. Wimmer* (Kan.), 21 R. R. R. 154, 44 Am. & Eng. R. Cas., N. S., 154; foot-notes appended to *Indiana Union Traction Co. v. Jacobs* (Ind.), 20 R. R. R. 653, 43 Am. & Eng. R. Cas., N. S., 653.

For the authorities in this series on the subject of the duties and liabilities of a carrier of passengers with respect to stations, platforms, and other stopping places, see foot-notes appended to *Moody v. Boston & M. R. R.* (Mass.), 21 R. R. R. 752, 44 Am. & Eng. R. Cas., N. S., 752; foot-notes appended to *Thompson v. Gardner, etc., Ry. Co.* (Mass.), 21 R. R. R. 480, 44 Am. & Eng. R. Cas., N. S., 480; foot-note appended to *Fitch v. Central R. Co.* (N. J.), 21 R. R. R. 475, 44 Am. & Eng. R. Cas., N. S., 475.

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mon carrier of persons for hire or reward must use the utmost care and diligence for their safe carriage, and must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of care and skill. Among these duties which devolve upon a railway company are: (a) It is the duty of a railway company to announce the approach of a station where passengers are to disembark; (b) to afford passengers reasonable time and opportunity, under the circumstances, to embark and disembark; (c) to provide reasonable platform facilities for persons to disembark and embark with safety; (d) to keep the station and platforms, at night, lighted in a reasonable manner; and (e) to keep the depot and platform free from dangerous obstructions.

Same—Injuries to Passenger.—In this case, the evidence discloses that the railroad company was negligent in the following respects: (a) In failing to call or announce the station; (b) in failing to stop a reasonable length of time to permit passengers to disembark and embark; (c) in not lighting its platform; (d) in permitting a dangerous obstruction to remain upon the platform at a point where passengers ought to have been able to embark and disembark with reasonable safety; and (e) in permitting the train to leave the station without the exercise of reasonable care in observing whether passengers had safely disembarked and embarked. Held, that the injury sustained to the plaintiff in this case was not due to the independent wrongful act of a responsible human agency, but was solely due to the negligence of the railway company and its servants and employees.

Trial—Instructions—Form—Numbering.—Where the instructions were reduced to writing, and clearly and concisely stated the law, the mere failure to number them did not constitute reversible error.

Carriers—Injuries to Passenger—Action—Sufficiency of Evidence.—The evidence in this case examined and considered, and held to be sufficient to sustain the general verdict and the special findings of the jury.

(Syllabus by the Court.)

Error from District Court, Oklahoma County; before Justice B. F. Burwell.

Action by Samuel Calhoun, by Anna Calhoun, his next friend, against the Atchison, Topeka & Santa Fe Railway Company. From a judgment in favor of plaintiff, defendant brings error. Affirmed.

This action was brought by Samuel Calhoun, an infant between two and three years old, by Anna Calhoun, his mother and next friend, to recover damages for personal injuries alleged to have been sustained by reason of the negligence of the defendant railway company. The material averments in the petition were, substantially, that the plaintiff was a minor, of the age of three years. That on August 24, 1903, Anna Calhoun, the mother of Samuel Calhoun, purchased a ticket from the defendant railway company at Arkansas City, Kan., for passage on a regular passenger train to Edmond, Okl., paying the regular fare therefor. That, after taking passage upon the train with her infant child, the conductor took up her ticket, and issued to her the usual check that is given to passengers, indicating the station which was her destination. That the plaintiff had never been over this line of road prior thereto. The train was late, and did not reach Edmond until about 11:30

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o'clock that night. That the servants of the railway company had failed to call the station of Edmond as the train approached. That the plaintiff's mother received no warning that she had reached her destination. That the train stopped an unreasonably short time to permit passengers to disembark. That the platform was dark—so dark that it was impossible to distinguish objects within a very short distance. That no assistance was given the plaintiff to disembark from the train. That, while lamps were attached to the sides of the depot for the purpose of lighting the platform, they were not burning. The plaintiff says further that, when said train arrived at said station, the night was very dark. That defendant had previously caused lamps to be placed at its depot, station, and usual place of alighting at said station of Edmond. That said lights are necessary, usual, and reasonable for the safety and accommodation of passengers alighting from trains in the nighttime. That the servants of defendant carelessly and negligently failed to light said lamps, and the same were not burning at the time said train arrived at said station. That, because of such neglect, it was impossible for said passengers to see so as to know when said station was reached, or to see or distinguish persons or other objects at the place of alighting from said train. That the servants of defendant had placed and left a certain truck, belonging to the defendant and under its control, near to said train and the place of alighting therefrom at said station, in a careless and negligent position, and standing diagonal to said train, and which it was impossible to see, because of the darkness occasioned by the failure to light said lamps, and which was not in use or there for any lawful or necessary purpose, and which was there, and in such position at the time of the arrival of said train at said station. That after said train had arrived at said station of Edmond, and had stopped thereat, and with no information from the servants of the defendant, the said passengers learned the fact from other passengers thereon. That none of said servants came to offer or afford any assistance to said passengers in alighting from said train. That, knowing of the duty of said servants to give such assistance, and relying upon the performance of said duty, and expecting them or some of them to appear at the exit from said train, for the purpose of rendering such assistance, the said passengers undertook to alight from said train. That, at the exit from said train, said Samuel Calhoun was taken from the train by one Carl Jones, and, before said Anna Calhoun could alight from said train, the same was carelessly and negligently put in motion by the said servants of defendant. That said Jones was dressed in uniform, and, because of such darkness so occasioned, it was impossible to distinguish him from servants of defendant in charge of said train, who were likewise so dressed. That said Anna Calhoun believed said Jones to be one of said servants, and that he was taking said Samuel Calhoun in pursuance of his duties as said

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servants, and that, while said train was moving, she believed the same to be temporarily moving for a short distance, for some proper purpose in connection with the operation thereof and that the same would again soon stop to enable her to alight therefrom, because of which said facts she remained upon the platform or steps of one of the cars of said train while the same was in motion, and that said Jones, for the civil purpose of avoiding the separation of her from her child, carried said Samuel Calhoun along beside of said train, at and near the usual place of alighting therefrom. That while carrying said child, and because of the darkness so occasioned by the carelessness and negligence of the defendant, in the failure of its servants to light said lamps and in leaving said truck so placed, said Jones was unable to see by said darkness and came in contact therewith. That the violence occasioned by said contact compelled the said Jones to let go said child, who because of his tender age and inability to protect himself was thereby thrown under said train, and the wheels of one of the cars thereof passed over his right foot and leg, severing the same, whereby the said foot and lower part of said leg was wholly lost and destroyed, rendering the said Samuel Calhoun a permanent cripple, disabling him from physical and manual efforts and labor, occasioning a layout of a large sum of money for surgeon's and doctors' fees, to wit, \$200, and permanently impairing his health and rendering him unable of earning a livelihood by the usual efforts of life—all to his damage in the sum of \$25,000, and all of which was directly due to the negligence and carelessness of the defendant in the failure of its servants to take up said check, to announce the approach or arrival of said train, and to advise said passengers thereof, and to assist them in alighting therefrom, and negligently and carelessly failing to light said lamps, and in carelessly and negligently placing said truck, and failing to assist said passengers to alight from said train, and because of the dangerous condition of the said place of alighting, occasioned by the darkness and the dangerous position of said truck, and the careless and negligent failure to stop said train at said station long enough to enable said passengers to alight therefrom in safety, and the careless and negligent starting of said train before said passengers had alighted.

The railway company filed an answer, consisting first, of a general denial, and, second, stating that the injuries which the plaintiff sustained were due to the carelessness and negligence of the plaintiff's mother, and one Carle Jones, to whom the plaintiff had been intrusted, and which negligence contributed directly to the injury complained of, and on account of which the plaintiff is not entitled to recover. To this answer, the plaintiff filed a reply, consisting of a general denial. Upon the issues thus joined, the cause was submitted to a jury, and a verdict was returned in favor of the plaintiff, assessing his recovery at \$10,000. The railway company submitted a number

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of special interrogatories to the jury, which were returned with the general verdict, and a motion was made to render judgment upon the special findings of the jury, notwithstanding the general verdict, which motion was overruled, and exception saved. Thereupon the court approved the general verdict, and entered judgment accordingly. Motion for new trial was duly filed, considered, and overruled, and exception noted, and the case is brought here for review, on petition in error and case-made.

Henry E. Asp, Charles H. Woods, and George M. Green, for plaintiff in error.

Henry H. Howard, for defendant in error.

HAINER, J. (after stating the facts). The first question presented is whether, in a suit by an infant of the age of three years, by its next friend, and in its own right, for personal injuries, negligence of a parent or some third person can be imputed to the child, and thereby defeat a recovery. The authorities upon this question are not entirely harmonious, but, by the great preponderance of the adjudged cases, it is held that the negligence of a parent, guardian, or custodian is not imputable to the child, on the ground that it is not, and cannot be, responsible for the danger to which it is exposed; that it has no volition in establishing the relation of privity with the person whose negligence it is sought to impute to it, and should not and cannot be charged with the negligence of such person in permitting it to be exposed to a danger which it had not the capacity either to know or understand, or to avoid in any manner whatever. This doctrine, it seems to us, is based upon solid reason, and is certainly in consonance with right and justice, and has been adopted in at least 22 states and the District of Columbia. A collation of the authorities may be found on page 450 of volume 7 of the American and English Encyclopædia of Law, Second Edition. This doctrine has been adopted by the Circuit Court for the District of Indiana, in *Berry v. Lake Erie, etc., R. Co.* (C. C.) 70 Fed. 679; and by the United States Circuit Court of Appeals for the Eighth Circuit, in *Chicago G. W. Ry. Co. v. Kowalski*, 92 Fed. 310, 34 C. C. A. 1. In the latter case, Circuit Judge Thayer, after reviewing the authorities, concludes as follows: "We think that there is at the present time a decided preponderance of authority in favor of the doctrine that, in a suit brought by an infant in its own right for personal injuries, its parents' fault or negligence cannot be imputed to the child. In view of the general trend of the authorities, it is highly probable that this view will ultimately prevail in the courts of last resort of all the states composing this circuit which have not already adopted it, and for that reason, among others, we think that it should be sanctioned by this court. The judgment of the lower court is therefore affirmed."

The leading case in this country holding the contrary doctrine

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is *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, decided in 1839 by the Supreme Court of New York, which doctrine, it seems, has been adhered to in that state. The New York doctrine has been followed in Massachusetts in the case of *Gibbons v. Williams*, 135 Mass. 33; in Maine, in the case of *Brown v. Railway Co.*, 58 Me. 384; in Minnesota, in *Fitzgerald v. Railway Co.*, 29 Minn. 336, 13 N. W. 168, 43 Am. Rep. 212; in California, in *Meeks v. Railroad Co.*, 52 Cal. 602; and in Wisconsin, in *Parish v. Town of Eden*, 62 Wis. 272, 22 N. W. 399; and in a few other states. The doctrine of *Hartfield v. Roper* was repudiated as early as 1850 by the Supreme Court of Vermont, in the case of *Robinson v. Cone*, 22 Vt. 213, 54 Am. Dec. 67, in an able decision rendered by Judge Redfield. In *Newman v. Phillipsburg Horse-Car R. Co.*, 52 N. J. Law, 446, 19 Atl. 1102, 8 L. R. A. 842, Chief Justice Beasley, in a learned opinion, criticises the doctrine announced in *Hartfield v. Roper*. as follows: "In this case, in *Hartfield v. Roper*, 21 Wend. 615, 34 Am. Dec. 273, it is evident that the rule of law enunciated by it is founded in the theory that the custodian of the infant is the agent of the infant. But this is a mere assumption, without legal basis; for such custodian is the agent, not of the infant, but of the law. If such supposed agency existed, it would embrace many interests of the infant, and could not be confined to the single instance when an injury is inflicted by the co-operative tort of the guardian. And yet it seems certain that such custodian cannot surrender or impair a single right of any kind that is vested in the child, nor impose any legal burden upon it. If a mother, traveling with her child in her arms, should agree with a railway company that, in case of an accident to such infant by reason of the joint negligence of herself and the company, the latter should not be liable to a suit by the child, such an agreement would be plainly invalid on two grounds: First, the contract would be *contra bonos mores*; and, second, because the mother was not the agent of the child authorized to enter into the agreement. Nevertheless, the position has been deemed defensible that the same evil consequence to the infant will follow from the negligence of the mother, in the absence of such supposed contract, as would have resulted if such contract should have been made, and should have been held valid. In fact, this doctrine of the imputability of the misfeasance of the keeper of a child to the child itself is deemed to be a pure interpolation into the law; for, until the case under criticism, it was absolutely unknown, nor is it sustained by legal analogies. Infants have always been the particular objects of the favor and protection of the law. In the language of an ancient authority, this doctrine is thus expressed: 'The common principle is that an infant, in all things which sound in his benefit, shall have favor and preferment in law as well as another man, but shall not be prejudiced by anything to his disadvantage.' 9 Vin. Abr. 374. And it would appear to be plain that nothing could be more to

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the prejudice of an infant than to convert, by construction of law, the connection between himself, and his custodian, into an agency, to which the harsh rule of respondeat superior should be applicable. The answerableness of the principal for the authorized acts of his agent is not so much the dictate of natural justice as of public policy, and has arisen, with some propriety, from the circumstances that the creation of the agency is a voluntary act, and that it can be controlled and ended at the will of its creator. But, in the relationship between the infant and its keeper, all these decisive characteristics are wholly wanting. The law imposes the keeper upon the child, who, of course, can neither control nor remove him; and the injustice, therefore, of making the latter responsible in any measure whatever for the torts of the former, would seem to be quite evident. Such, subjectively, would be hostile in every respect to the natural rights of the infant, and consequently cannot, with any show of reason, be introduced into that provision which both necessity and law establish for his protection." In *Berry v. Lake Erie & W. R. Co.*, supra, District Judge Baker, speaking for the court, said: "The doctrine which imputes to an infant, non sui juris, the negligence of its parent or guardian, seems to be unsound in principle, and is not supported by the weight of authority. It is yielding to the more enlightened and humane rule which denies the doctrine of imputed negligence in relation to infants incapable of exercising care for their own safety."

My conclusion, then, on this branch of the case, is that the trial court properly held that the negligence, if any, of the mother or of Carl Jones, could not be imputed to the infant child.

But it is earnestly contended by the railway company that the injuries complained of were due solely to the independent wrongful act of a responsible human agency, to wit, the act of Carl Jones, whose negligence was the direct and proximate cause of the injury, and whose negligence could not have been reasonably anticipated by the railway company, or its servants. This doctrine is clearly stated by Mr. Ray, in his work on *Negligence of Imposed Duties, Passenger Carriers*, p. 669, where it is stated: "But where the concurrent cause is the independent, wrongful act of a responsible person, such act arrests action, being regarded as the proximate cause of the injury; the original negligence being considered as its remote cause. As in the law it is the proximate, and not the remote, cause, which is regarded, he who is guilty of the original negligence is not chargeable, but redress must be sought from him who directly caused the injury." And the same doctrine is fully and clearly discussed in the brief of counsel for plaintiff in error. Perhaps, one of the best considered cases is the case of *Missouri Pac. Ry. Co. v. Columbia*, 69 Pac. 338, 65 Kan. 390, 58 L. R. A. 399, in which Justice Pollock, speaking for the Supreme Court of Kansas, discusses this question in an elaborate opinion, and in which case the facts may be briefly stated as follows;

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"C. D. Columbia, a locomotive fireman in the employ of the Missouri Pacific Railway Company, was killed by the derailment of his engine at the station of Langley, on said road. His widow, Jennie V. Columbia, in her own behalf and in behalf of minor children, brought this action to recover damages on account of negligence of the company resulting in his death. The acts of negligence charged are: First, that the company negligently permitted several heavy grain doors to be piled and remain upon a raised platform at the west end of its depot, at the station of Langley, near the track upon which the engine which Columbia was firing was scheduled to pass on, the night of May 9, 1899, and said heavy grain doors, being there so negligently placed, were blown off, falling upon the track, derailing the engine, causing the death; second, that it was the duty of the company to provide a reasonably safe and clear track over which said engine should run, and, in disregard of its duty in this respect, the company negligently permitted said heavy grain doors to remain upon the track after being blown there by the wind, thus obstructing the track, rendering it unsafe for use, the result of which negligence caused the death of Columbia." It will thus be seen that the direct and proximate cause of the injury in that case was a severe gale, for which the railroad company was in no manner responsible, and hence the court properly held that: "In a case where two distinct, successive causes, wholly unrelated in operation, contribute toward the production of an accident resulting in injury and damage, one of such causes must be the proximate and the other the remote cause of the injury. A prior and remote cause cannot be made the basis of an action for the recovery of damages, if such remote cause did nothing more than furnish the condition or give rise to the occasion by which the injury was made possible, if there intervened between such prior or remote cause and the injury a distinct, successive, unrelated, and efficient cause of the injury." But the facts in this case under consideration are clearly distinguishable from the facts in the Kansas case. In this case the direct and proximate cause of the injury was directly attributable to the truck, which the servants of the railway company negligently permitted to remain upon the platform, which was dark, in fact so dark that an obstruction could not be observed by the exercise of reasonable care. Had the platform been free from obstruction, or had it been lighted so that passengers could have observed the obstruction by the exercise of reasonable care, we think the accident would have been avoided.

In *Chicago, R. I. & P. Ry. Co. v. Stibbs*, 87 Pac. 293, this court laid down the rule that: "A common carrier of persons for hire or reward must use the utmost care and diligence for their safe carriage, and must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." What are some of these duties which devolve upon a

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railroad company? (1) It is the duty of a railway company to notify or warn passengers of the approach of a station where passengers are to disembark; (2) to afford passengers reasonable time and opportunity, under the circumstances, to embark and disembark; (3) to provide reasonable platform facilities for persons to disembark with safety; (4) to keep the station and platform lighted in a reasonable manner; (5) to keep the depot and platform free from dangerous obstructions. In what respect does the evidence show that the railway company was negligent in this case? While the evidence was conflicting, it appears from the weight of the testimony that the servants of the railway company failed to announce the station as the train approached Edmond; second, that the train did not stop a reasonable time to permit passengers to disembark; third, that the depot platform was dark; fourth, that the lamps at the station platform were not lighted; fifth, that the servants of the railway company had left the truck, belonging to the defendant company and under its control, near to the train and the place of alighting therefrom at said station, and in such a position that it was impossible to observe it, on the account of the darkness of the night and the darkness of the platform, by the exercise of reasonable care. In all these respects it appears from the clear weight of the testimony that the railway company and its servants were guilty of negligence. Hence we think that the facts in this case are clearly distinguishable from the facts of the cases cited by counsel for plaintiff in error. We have examined the authorities cited in the brief, and have no serious criticism to make in regard to the general principle of law announced therein, but believe that the facts in those cases are clearly distinguishable from the facts in the case now under consideration. The law of direct and proximate cause of injury seems to be well settled by the authorities, but the difficulty the courts have is in applying the law to the facts of each particular case.

In *Insurance Company v. Tweed*, 74 U. S. 44-52, 19 L. Ed. 65, Mr. Justice Miller, in discussing this question, uses the following language: "If we could deduce from them the best possible expression of the rule, it would remain, after all, to decide each case largely upon the special facts belonging to it, and often upon the very nicest discriminations. One of the most valuable of the criteria furnished by us by these authorities, is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote." In the present case there were a number of negligent acts by the railway company. It was negligent in not announcing the station; it was negligent in failing to stop a reasonable length of time at the station to permit the plaintiff to disembark; it was negligent for permitting its platform to be practically in total darkness; it was negligent in permitting a dangerous ob-

Rose v. Boston, etc., Ry. Co

Exceptions from Superior Court, Middlesex County; John A. Aiken, Judge.

Action by Bessie Rose against the Boston & Northern Street Railway Company for injuries to plaintiff while alighting from defendant's street car. The court ordered a verdict for defendant, and plaintiff brings exceptions. Overruled.

Joseph Bennett, for plaintiff.

Endicott P. Saltonstall, for defendant:

MORTON, J. We assume in favor of the plaintiff that the evidence would warrant a finding that she was in the exercise of due care, that she did not cease to be a passenger in alighting in accordance with the conductor's directions to take another car for the purpose of being transported to her destination, and that, under the circumstances, the conductor was bound to exercise due care in selecting a place for her to alight and make the change. But we see no evidence that the conductor failed to exercise due care in selecting a place for her to alight. The change from one car to another was not rendered necessary by anything which the defendant had done or omitted to do. The repairs which rendered it necessary to make the change were being made by the Boston Elevated Railway Company as lessee of the West End Street Railway Company which owned the track and the defendant had nothing to do with them, and the place of the accident was a public highway. The case differs therefore in essential particulars from the case of *Joslyn v. Milford, Holliston & Framingham St. Ry. Co.*, 184 Mass. 65, 67 N. E. 866, relied on by the plaintiff. The plaintiff claims that the place where she was invited to alight was not a suitable place because of the yielding nature of the ground on which she stepped as she got off the car and which she claims caused the injury complained of. But there is nothing to show that the conductor or the defendant or its agents knew or in the exercise of proper care should have known that the ground where the plaintiff stepped down from the car was liable to yield. The plaintiff testified on direct examination that it appeared to her "as though every thing was all right," and on cross-examination that "It was kind of gravelly down there. It looked all right as I put my foot down. It looked level with the road." The repairs were not made by the defendant as in *Joslyn v. Milford, etc., St. Ry. Co.*, *supra*, and there is nothing to show we think that the conductor was not justified in assuming as the plaintiff did that the road was "all right."

Exceptions overruled.

CINCINNATI, N. O. & T. P. RY. CO. v. GIBONEY.

(Court of Appeals of Kentucky, March 5, 1907.)

[100 S. W. Rep. 216.]

Damages—Personal Injury—Measure of Damages.—Where, in an action for personal injury, there was no allegation of loss of time or expense, the measure of damages was a reasonable compensation for the mental or physical suffering endured, and for the permanent impairment of power to earn money proximately resulting from the injury, and an instruction to find for plaintiff such an amount as would reasonably compensate her for any temporary or permanent injury sustained, and any suffering or pain endured, was erroneous.

Carriers—Personal Injuries—Condition of Premises—Negligence.*—A railroad must maintain its stations and platforms in a reasonably safe condition for passengers taking passage on its trains or coming to the stations for that purpose.

Same—Persons to Whom Liable.†—A husband and wife, with their two children, went to a station to take a train. On being unable to obtain a seat in the train, they alighted and placed one of their children on the train for the purpose of sending him home with relatives. The child began to scream on finding that his mother was not going to get on, and she, on starting to take the child from the train through a window, stepped into a hole and was injured. The hole was in the pathway used by persons taking and leaving the train. Held, that the wife had not lost her right to be where she was at the time of the injury, and was entitled to recover, if she exercised ordinary care.

Appeal from Circuit Court, Boyle County.

“To be officially reported.”

Action by Lena Giboney against the Cincinnati, New Orleans & Texas Pacific Railway Company. From a judgment for plaintiff, defendant appeals. Reversed, and remanded for new trial.

Chas. H. Rodes and John Galvin, for appellant.

Robert Harding, Emmett Puryear, and Greene & Van Winkle, for appellee.

HOBSON, J. In September, 1904, Mrs. Lena Giboney, with her husband and two children, went from McKinney to Somerset on a round-trip ticket over the railway of the Cincinnati, New Orleans & Texas Pacific Railway Company to attend the Pulaski County Fair. On the afternoon of the last day of the fair she and her husband and the two children came to the station for the purpose of going home. The train was to leave at 6 o'clock. A train going south was on the track next to the platform. The train going north, which she was to take, was on the second track from the platform, and they walked across the main track to the space between that track and the next for the purpose of taking their train. Upon an examination of the train they found it so crowded that they could not get a seat, and con-

*See foot-notes appended to second preceding case.

†For the authorities in this series on the subject of the duties and liabilities of carriers with respect to persons assisting or accompanying their passengers, see foot-notes appended to *Southern Ry. Co. v. Patterson* (Ala.), 21 R. R. R. 283, 44 Am. & Eng. R. Cas., N. S., 283.

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cluded not to take the train, but to wait until the next morning. Mrs. Giboney's father and mother were on the train. She was not very well, and concluded to send the older child, who was nine years old, home with them, so that she would only have one child to care for that night. Her husband picked up the little fellow and put him through the window of the coach. She stood by the side of the coach talking to some friends. When the train was about to pull out, the child screamed, and apprehension was felt that he would go into convulsions. So he was handed out through the window by a friend. Mrs. Giboney had just started to leave, and, when she heard the child scream, turned around, and, when she saw him in the window, went to take him. In going to take the child she stepped into a waterbox which had been left open in the space between the two tracks, and fell, severely spraining her ankle. To recover for this injury she brought suit, and, having secured a verdict and judgment for \$2,000, the railroad company appeals.

The car in which they placed the child was the rear car of the train. She was near the rear end of the car when the child screamed, and the child was only a few feet from her. The water box was in the space that the passengers would use in passing along the cars to get on the train, and Mrs. Giboney would perhaps have seen the hole which was about a foot deep if she had looked down and had not been looking up at the child as she advanced to take him, although there is some testimony that the light was not good. The court instructed the jury as follows:

"(1) If you believe from the evidence that the plaintiff held a ticket that entitled her to travel as a passenger upon the defendant's train from Somerset to McKinney on the afternoon of the accident, and that she went to the depot at the place provided for boarding said train with the intention of taking said train, and with such intention she went to said train, and then concluded not to take same, and in undertaking to leave she stepped into a hole or water box that was made or permitted by defendant to be or remain open at or unreasonably near to the place provided for passengers to board said train, and that thereby she sprained or dislocated her ankle, then you should find for her such an amount in damages as will reasonably compensate her for any temporary or permanent injury she sustained and any suffering or pain she endured, not exceeding the sum of \$2,000, and, if you do not so believe, then you should find for the defendant.

"(2) However, if you believe from the evidence that, after the plaintiff concluded not to board said train, she approached the same for another purpose than that of boarding said train as a passenger, and that in so approaching said train she stepped into the hole or water box, then the law is for the defendant, and you should so find.

"(3) If you believe from the evidence that, at the time and

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place the plaintiff received the injuries complained of, she herself was guilty of such negligence and want of care as a person of ordinarily prudent habits would exercise under like conditions, and that but for which she would not have received the injuries complained of, or that such negligence and want of care, if any, contributed to the injury complained of, and but for that the accident would not have happened, then, in that event, the law is for the defendant, and you will so find."

The instructions did not correctly state the law of the case. The measure of damages given in instruction 1 is erroneous. In lieu of this part of the instruction, the court should have told the jury that, if they found for the plaintiff, the measure of damages was a reasonable compensation to her for the mental or physical suffering which she endured, if any, or the permanent impairment of her power to earn money, if any, which was the natural or proximate result of her injury. *Lexington Railway Company v. Herring* (Ky.) 96 S. W. 558; *L. & N. R. R. Co. v. Hall*, 115 Ky. 579, 74 S. W. 280; *L. & N. R. R. Co. v. Logsdon*, 114 Ky. 746, 71 S. W. 905; *South Covington, etc., Ry. Co. v. Nelson* (Ky.) 89 S. W. 200. There was no allegation of loss of time or expense, and therefore these matters, under the pleadings, were properly omitted from the instruction.

We see no objection to instruction 3, but instructions 1 and 2 do not present the law applicable to the case. In lieu of them the court should have instructed the jury that it was incumbent upon the railroad company to maintain its station and platforms in a reasonably safe condition for passengers taking passage upon its trains or coming to the station for that purpose, and that, if they believed from the evidence that the space between the two trains which was to be used by persons taking the train going north was not reasonably safe for that purpose, and that Mrs. Giboney was upon this space either for the purpose of taking the train herself or of putting her child upon the train or taking him from the train, she was where she had a right to be, and if she was injured by reason of the space between the two trains not being reasonably safe for the purposes indicated, while exercising ordinary care for her own safety, they should find for the plaintiff.

The evidence is clear that she and her husband went to the train with their two children for the purpose of going home; that they got on the train, and, being unable to get a seat, got off; and that they then placed the little boy on the train for the purpose of sending him home with his grandparents. The child began to scream when he found his mother was not going to get on, and this was about the time the train was starting. Mrs. Giboney had not lost her right to be on the platform, and when the child screamed she had a right to take him from the window, as that was the most practicable way to get him off the train. It was incumbent upon the railroad company to have a reasonably safe platform for the use of the passengers on this crowded

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train or for the use of those assisting passengers on or off who required assistance from age or infirmity. In 3 Thompson on Negligence, § 2685, the rule is thus well stated: "This duty extends to passengers who are rightfully upon the premises of the carrier when the injury takes place—as, for example, to a passenger who has just come into the railway station, from another train, and who is injured by being struck by a car projecting over the station platform; and to a passenger who, in the course of the transit, temporarily leaves the carrier's vehicle for a proper purpose, as where a passenger on a steamboat goes ashore for a meal at an intermediate stopping place. Nor is this duty confined to passengers merely, but, upon an analogy elsewhere stated, it extends to the protection of persons coming to the station of the carrier to meet their friends arriving on his vehicle, or to see them safely off." In *Tobin v. Portland, etc., R. R. Co.* (Me.) 8 Am. Rep. 415, a hackman who carried persons to and from a railroad station was held entitled to recover for an injury from a defect in a platform. In *Hamilton v. Texas & Pacific R. R. Co.* (Tex. Sup.) 53 Am. Rep. 756, the plaintiff, who had gone to the station to assist two old people who were there to take the train, and stepped in a hole receiving injuries, was held entitled to recover. The same principle was applied in *McKone v. Michigan Central R. R. Co.* (Mich.) 17 N. W. 74, 47 Am. Rep. 596, where the plaintiff was waiting at the station for his wife, whom he expected on the train. To same effect, see *Toledo, etc., R. R. Co. v. Grush* (Ill.) 16 Am. Rep. 618; *L. & N. R. R. Co. v. Wolfe*, 80 Ky. 82; note to *Dowd v. R. R. Co.* (Wis.) 54 N. W. 24, 20 L. R. A. 527, 36 Am. St. Rep. 917.

Judgment reversed, and cause remanded for a new trial.

KENTUCKY & I. BRIDGE & R. CO. v. BUCKLER.

(Court of Appeals of Kentucky, March 8, 1907.)

[100 S. W. Rep. 328.]

Carriers—Injury to Passenger—Setting Down Passenger.*—A passenger on a street car at night informed the conductor that he desired to alight at a certain street, but he was carried by, and the conductor then refused to back the car or to permit the passenger to remain on the car until it returned to the desired street, but instructed plaintiff to walk to a certain light, which he pointed out, and then turn in a certain direction, stating that such course would take the passenger to his destination, and the passenger, while following such directions walked upon a trestle and fell through it, whereby he was injured, not having known, owing to the darkness, that he was on a trestle when he fell, held, that the carrier was liable, as it was its duty to see that the passenger got safely to the desired street.

Same—Contributory Negligence—Evidence—Sufficiency.—The evidence was sufficient to sustain a finding that the passenger was not guilty of contributory negligence.

*For the authorities in this series on the subject of the duties and liabilities of carriers with respect to discharging passengers, see third preceding case, and foot-notes.

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Appeal from Circuit Court, Jefferson County, Common Pleas Branch, Third Division.

"To be officially reported."

Action by L. B. Buckler against the Kentucky & Indiana Bridge & Railroad Company. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Humphrey & Humphrey, for appellant.

Burgevin & Dinwiddie and *Sam. Avritt*, for appellee.

NUNN, J. This suit was instituted by appellee against appellant for damages on account of personal injuries received through the alleged negligence of the appellant's servants. The case was tried, and a verdict returned in favor of appellee for \$5,100. This appeal is prosecuted by appellant to reverse the judgment rendered upon this verdict.

The appellee's testimony shows the following state of facts: That late in the afternoon on the day he received his injuries at night he went to a steamboat that was tied in the canal at the foot of Twenty-Sixth street, and obtained employment. Then he started to his sister's in the upper end of the city, to get his clothes to take on the trip. A young man by the name of Kelly, with whom he became acquainted on the boat, went up with him. On their return they took passage on one of appellant's cars at First and Water streets. On paying their fare they informed the conductor that they wanted to get off at Twenty-Sixth street; that they wanted to get to the boat, stating where it was situated. The car failed to stop at Twenty-Sixth street. They called the conductor's attention to the fact that he was passing without stopping. He stated that they could get off at the next stop. The car was not stopped until they arrived at Thirtieth street. When they arrived there they found it dark, and were unable to see how to get to reach their place of destination. They protested against getting off at that place, and requested that the car be run back to Twenty-Sixth street, or that they be permitted to remain on the car until it returned to Twenty-Sixth street, which was refused by the conductor. The conductor then told them to walk back up the track, nearly to a dim light that he pointed out to them, and then turn to the left and go towards the river, which would take them to their boat. They both testified that they had never been in that part of the city below Twenty-Sixth street before; that they did not know which way to go independent of the direction given them by the conductor, and, in compliance with his instruction, they walked up the track to the place designated, where appellee turned to the left, and stepped from a trestle, falling about 12 feet, striking his breast on a stump, breaking four or five ribs, severely and permanently injuring himself. They also stated that it was so dark that they could not see and did not know they were on a trestle at the time appellee fell. The conductor, in his testimony, contradicted all of the testimony given by appellee and the witness Kelly, except that part that

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when they paid their fare, they said to him that they wanted to get off at Twenty-Sixth street to go to a steamboat tied up at the foot of that street. The motorman corroborated the conductor with reference to the car stopping at Twenty-Sixth street, but he did not hear anything said between the conductor and appellee; he being at the front end of the car. Appellee introduced testimony, in rebuttal, tending to show that the witness, who professed to be the conductor, was not the conductor on the car on which appellee and the witness Kelly were on the night of the injury. Appellant makes no contention as to the extent of appellee's injury, nor to the amount of the verdict; but claims that the carrying of him beyond his destination was not the proximate cause of his subsequent injuries while attempting to get back to his place of destination; that appellant is not responsible for the injuries received by appellee as the result of misdirections of its conductor; that, if the conductor gave appellee directions how to reach his place of destination, it was not within the scope of his employment, and not binding upon appellant, and, further, that the injuries received by appellee were the result of his own contributory negligence.

Appellee and his companion were left at the place stated, virtually out of the city, with obstructions on either side of the track which made it dangerous for them to attempt to leave, not knowing which way to go to reach their place of destination other than to follow the directions of the conductor. Their boat was to leave in a short time. The question is: Under these circumstances, what action would an ordinarily prudent man have taken? Was he required to stand there until daylight? Was it more prudent, not knowing the surroundings, to start out at random in the darkness? Or was it more prudent for him to rely upon the instructions and assurances of safety offered him by the conductor, and go in the direction pointed out by him, and turn at the point indicated? The decided weight of authority is to the effect that when one is carried beyond his station, or stopped short of it, and is directed by the conductor to alight from the train, the passenger, being ignorant of the surroundings and dangers that might befall him while attempting to get to his station with or without the directions of the person in charge of the car, receives an injury while exercising ordinary care for his own safety, the company is responsible to him in damages. In such a case the company has not performed its contract, and, in effect, he is still a passenger until he reaches the station; and the injury received is the proximate result of the wrong done him.

In the case of *New York, Chicago & St. Louis Railway Co. v. Doane*, 115 Ind. 435, 17 N. E. 913, 1 L. R. A. 157, 7 Am. St. Rep. 451, the railroad company carried Mrs. Doane 80 or 90 rods beyond her station, where she was requested to and did alight from the car, and, in attempting to get back to the station, she fell into a cattlepit, breaking her arm. In that case the court said: "It also failed to perform a plain and very urgent duty

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when it neglected to either back its train to a convenient point near the station, or to give her such assistance or instructions as were necessary to assure her safe return to the station house after it had carried her beyond her place of destination. The duty of a railroad company as a common carrier of passengers is not fully performed until it delivers its passenger in proper condition at the station to which he has paid his fare. Mrs. Doane was not guilty of negligence in failing to discover some gates leading into private inclosures, and into an open and remote field through which she might have returned to the station by an unmarked and circuitous route. It was, under the circumstances, not only natural, but reasonable, aside from any directions or intimations which the conductor may have given her, that she would have attempted to follow the railway track back to the station house. Until she reached that point, she was still constructively a passenger on the railway train, and had a right to rely upon the information or directions which she may have received from the conductor."

In the case of *Adams v. Missouri Pacific Railway Co.*, 100 Mo. 555, 12 S. W. 637, 13 S. W. 509, the passenger was caused to alight from the train about a quarter of a mile before it reached the station. He found the path leading to the platform blocked by a coal car, and, finding no other way out climbed over it and jumped down on the other side, sustaining the injuries for which he sued. In defense it was urged that the injuries were not the proximate result of the defendant's negligence. Of this the court said: "The defendant's conductor, in requiring the plaintiff to get off of its train at a distance from the station to which he had paid his fare, was guilty of a breach of this duty. The plaintiff, in obeying his orders and getting off the train at the place where he was directed to do so, was obeying the orders of defendant. When he landed safely on defendant's roadbed beside the caboose, he was still a passenger of the defendant, to whom it owed not only the duty of transporting him on its train to its station at Harrisonville, a duty which it had refused, was then refusing, and continued to refuse to perform up to and including the moment in which the plaintiff was injured, but to whom the defendant also owed the further duty of providing for him a convenient and safe way by which he might leave defendant's train, its right of way and premises, and go about his own business. The duties that impelled the plaintiff to take passage on defendant's train were demanding his presence at the point of his destination. Thus far he had done all he could to meet the requirements of his sense of those duties, but now he was about to fail, and must fail to meet the requirements of those personal duties, unless he takes up the discharge of defendant's duty thus unexpectedly, and against his will, thrust upon him, of finding a way and transporting himself to the station. To do this on foot and by the way that seemed to him most practicable was the only course left open to him. To this course he was constrained by

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defendant's neglect of duty. That duty attending him, however, and every step taken by him in the effort to reach the station, was the direct effect of defendant's neglect of duty towards him. That the plaintiff, when he was wrongfully set afoot at a distance from, would seek to reach, the station with ordinary care and caution by the most practicable route, was to be expected, and ought to have been foreseen, by defendant's servants. If there was danger in that way, such danger ought to have been foreseen, and that he was liable to encounter it. If in such encounter he was injured, such injury was the proximate, because the natural, although not the necessary or inevitable, result of the defendant's negligence, and for it the defendant ought to be held responsible."

In the case of *Winkler v. St. Louis, Iron Mountain & Southern Railway Company*, 21 Mo. App. 99, the appellant was taken beyond his station in the nighttime. When his station was called, he arose and was directed to go out of the rear end of the car, which he did when the car stopped. His testimony was that the night was very dark, and continued, in substance, as follows: "After we alighted on the ground the conductor said, 'Stand still till we pull out, and then you will be all right'; and immediately pulled the train out. We looked around and could not see the depot and were bewildered, and did not know where we were. We deliberated as to what we would do. It was about 2 or 3 o'clock in the morning; think this point was below the station about 300 yards, but it seemed that night about a quarter of a mile. After a short deliberation, and noting the surroundings, we started back. We were following the railroad track. We could not see any other road to follow by reason of the darkness. I was walking on the track and could not distinguish the ties and space between them. It was very dark. I suddenly fell, one foot going through the timbers of the trestle." The evidence of Winkler was corroborated by a traveling companion. That case and the one at bar are almost alike. The claim was made by the appellant in that case that the injury received by Winkler was not the proximate result of the appellant's wrong in carrying him past his station and putting him off at another point. The court in that case also said: "If a passenger, instead of being discharged at the place called for in the contract of carriage, is discharged in the nighttime at another place, so that in getting to his place of destination it becomes necessary to walk along a path containing a dangerous obstruction, it is not too much to say that the danger of his being injured by such obstruction is a danger which the carrier ought to foresee, and that it is not an unnatural, improbable, or remote consequence of the act of discharging the passenger in such a place."

See, also, the cases of *Patten v. Railroad Company*, 32 Wis. 524; *Burnham v. Railroad Company*, 91 Mich. 523, 52 N. W. 14, and *Kentucky Central Railroad v. Biddle*, 34 S. W. 904, 17 Ky.

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Law Rep. 1363. The last case was where two young ladies were carried beyond their station. They walked back to it, and sued the company for damages, and the court said: "On the other hand, the walk of the appellees was clearly in consequence of the negligence of the conductor. They might have sought and obtained shelter among the strangers by whom they were surrounded, but were not bound to under the circumstances surrounding them. The injuries resulting from their walk are the proximate results of the failure of the train to stop at Garnett." The cases cited by appellant's counsel in the main do not apply to the facts of this case.

In the case of *Lewis v. Flint & P. M. Ry. Co.*, 54 Mich. 55, 19 N. W. 744, 52 Am. Rep. 790, the plaintiff was carried some distance beyond his station. This fact he knew when he left the train. He asked the conductor about the matter, and was informed that he had been carried beyond his station about two car lengths. He said, if that was the case, it did not matter, and got off the train. Soon afterwards he discovered that the conductor was mistaken, or at least had misinformed him, as to the distance they had passed the station, and in trying to reach the highway, for which he was bound in the first instance, he stepped into a ditch and was injured. The syllabus of the case states: "Plaintiff knew the neighborhood, and knew where the road crossed the track there were cattle guards and culverts on both sides of it." In the case at bar appellee did not know there was a trestle up the track from which he might fall. In the case referred to plaintiff voluntarily left the train, merely asking the conductor's opinion as to how far beyond the station he had run. In the case at bar appellee objected to being required to leave the car, and did so under protest. The conductor knew the trestle was up the track, but did not inform appellee of it, and appellee did not know it.

In the case of *Cincinnati, Hamilton & Indianapolis Railroad Co. v. Carper*, 112 Ind. 26, 13 N. E. 122, 14 N. E. 352, 2 Am. St. Rep. 144, the plaintiff's intestate through his own mistake boarded the wrong train. The mistake was discovered after the train had passed over a bridge or trestle. The train was stopped for him, and he got off for the purpose of going back to the station and boarding the train he intended to leave on. As he did so, he inquired of the conductor as to the best way to get back to the station. The conductor gave it as his opinion that the best way for him to get back was to proceed along the railroad track, which he did, and while he was upon the trestle another train came along and killed him. As stated, he had boarded the train through his own mistake, to which the defendant had in no way contributed. He left the train voluntarily as being the best thing possible for him to do under the circumstances. The court held that the act of the conductor in advising him as to the best way to get back to the station was not within the scope of the conductor's authority. The case is not like the one at bar. The de-

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fendant was not responsible for his mistake in getting on the train. It owed him no duty to back the train to the station. If it had owed him any such duty, he waived it by voluntarily getting off the train. When he had gotten off the train in safety, the company was no longer responsible to him for any injury he might receive; but the court in that case said: "If the conductor had refused to carry the deceased to a regular station, or had compelled him to leave the train, an essentially different question would have faced us; but the passenger here leaves the train without complaint. It is not the theory of the complaint that the conductor put the deceased off the train at an improper place. The case is not, therefore, controlled by the authorities upon that general subject." Plainly admitting that had the conductor put him off at an improper place, the rule would have been different.

The case of *Haley v. St. Louis Transit Co.*, 179 Mo. 30, 77 S. W. 731, 64 L. R. A. 295, was against a street railway. The plaintiff was carried one square beyond her destination in a city, and in walking back on the icy pavement she fell and received the injury for which she sued. A different rule is applicable to a case of that kind. The plaintiff was deposited at a safe place in daylight in the streets of a city, and, while she might have had a cause of action for being carried beyond the place at which she was to alight, she could not recover damages for personal injuries plainly brought about by an intervening cause. It was not shown that there was no ice at the place where she desired to alight, and the presumption is that there was ice on the pavements all over the city; and she was as likely to fall at the place she desired to alight as any other.

In the case of *Benson v. Central Pacific Ry. Co.*, 98 Cal. 45, 32 Pac. 809, the appellant, a little girl, was walking back with her father along the railroad track, after having been carried beyond her destination, when they were caught by another train. They had, however, left the track when the child broke away from her father and ran back in front of the train. This case is not like the case at bar on account of the manifest difference of the facts. The court distinguishes the facts of that case from the case of *New York, Chicago & St. Louis Railway Co. v. Doane*.

Under the facts proven by appellee, it was the duty of appellant to see that the appellee got safely to Twenty-Sixth street. Appellant might have accomplished this end in several ways. It might have stopped its car at Twenty-Sixth street and allowed appellee to alight; it might have backed its car from Thirtieth to Twenty-Sixth street, as he demanded; it might have allowed appellee to remain on the car until the return trip—each of which it refused to do. If appellant chose rather than to do either one of these things, to take some other means of getting appellee to his destination, if it chose to take chances, directing him how to go back unaided from the place where it wrongfully deposited him, then it cannot be heard to say that the injuries which the ap-

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pellee received were not directly the result of these wrongful acts and not the proximate result of the same.

The court submitted to the jury, by proper instructions, the question whether the appellee, under the circumstances, acted as a reasonably prudent man would; and the jury, by its verdict, decided that he did. The question of contributory negligence was also submitted under proper instructions to the jury and the jury found against appellant. The instructions as a whole were as favorable to appellant as it could have asked.

For these reasons, the judgment of the lower court is affirmed.

HANLON v. CENTRAL R. CO. OF NEW JERSEY.

(Court of Appeals of New York, Jan. 8, 1907.)

[79 N. E. Rep. 846.]

Carriers—Negligence of Conductor in Assisting Passenger to Alight—Liability.*—A conductor in proffering his aid to assist a passenger to alight from the car at her destination is acting within the scope of his employment; so that, though there was no duty to furnish such aid, the conductor having taken her by the arm and negligently withdrawn the support of his hand while she was stepping down, because of which she fell, the carrier is liable.

Trial—Instruction—Applicability to Evidence.—Refusal of an instruction, abstractly correct, is proper, where as requested it can only be understood by the jury as referring to the situation presented by the evidence, as to which it is not applicable.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Margaret E. Hanlon against the Central Railroad Company of New Jersey. From a judgment for plaintiff, affirmed by the Appellate Division (96 N. Y. Supp. 1127, 110 App. Div. 918), defendant appeals. Affirmed.

Robert Thorne, for appellant.

J. Stewart Ross, for respondent.

GRAY, J. The plaintiff, a passenger in a train upon the defendant's railroad, had arrived at her destination in Jersey City, and, while stepping from the car to the station platform, was injured by falling to the ground. It appears from the evidence that plaintiff was in the act of descending the car steps, when the train conductor reached out his hand to help her, taking her arm by the elbow. Before she had stepped down upon the platform, the conductor withdrew the support of his hand and she fell between

*For the authorities in this series on the subject of the duties and liabilities of carriers with respect to discharging passengers, see preceding case, and foot-note.

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the platform and the car. She had a verdict and the judgment thereupon has been affirmed below. As the case presented a question of some novelty, if not of some interest, in the law of negligence, leave was given to the defendant to further appeal to this court.

The charge of negligence made in the complaint was that "one of the servants of the defendant, in the course of his employment, took hold of the plaintiff's arm to assist her in alighting and * * * negligently and without warning, removed his hand * * * and, by reason thereof," she was thrown to the ground. The jury had been instructed that there was no claim of defects in steps, or in platform, and "that the defendant was under no duty, through its employees, or otherwise, to assist this plaintiff in alighting from the train." At the close of the charge, the court was then requested by the defendant to instruct the jury further, "that the defendant was not liable for the carelessness, if any, of the conductor in performing a gratuitous courtesy to the plaintiff." This request was refused, and the appellant argues that therein the trial court erred. It must be admitted that, if the request stated the correct rule of law, the refusal of the instruction to the jurors was most material and would entitle the defendant to a retrial of the issue. To establish the charge of negligence, it was necessary, in this case, as in all others, to prove that the defendant had failed in some legal duty, owing from it as a carrier of passengers. The legal duty must have existed and its breach must have been shown in an imperfect performance of the contract of carriage, or in the inadvertent omission or commission, of some act in the performance, the injurious results of which might have been foreseen by a reasonably prudent person. It is clear enough that the test here is whether the conductor of the train, in thus proffering his aid to the plaintiff upon her arrival at her destination, was acting within the scope of his employment. I suppose that the contract of carriage required the safe transportation of the plaintiff from the one to the other station and that that meant, if platforms were provided for passengers, from platform to platform. The contract implied the supply of proper agencies for its performance, in engines and cars for conveyance and in engineers, conductors, and brakemen to control and regulate the movements of the train and the reception and discharge of passengers. So far as the defendant's duty related to the transportation of the plaintiff upon its road, it had been performed and the only question is whether its contractual relation with her extended to a responsibility for the act of its servant in charge of the train, in the final act of discharging her from the car. It was not bound to furnish her any personal assistance in leaving the car, for she was, so far as the case shows, in the possession of her faculties and of good health, and was capable of moving about alone. There was nothing defective about the car platform and steps. The conductor of

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the train stood there, however, and voluntarily undertook to guide and to support her in descending from the car.

The cases to which we have referred do not necessarily control, in so far as a similarity in circumstances is required, and I find none which is precisely parallel. Cases where the servant has negligently assisted a passenger in alighting from a train, which has carried him beyond his station and stops at an unsuitable place for getting off, or where the preparations for alighting were defective and unsafe, or where the servant procured and negligently assisted a person to get on board of a moving car, do not present quite this point, of a voluntary act of assistance proffered by the servant to, and availed of by, a passenger, where none was called for, and so carelessly performed as to be the cause of injury. *Drew v. Sixth Av. R. R. Co.*, 26 N. Y. 49; *Foss v. Boston, etc., R. R.*, 66 N. H. 256, 21 Atl. 222, 11 L. R. A. 367, 49 Am. St. Rep. 607; *Werner v. Chicago, etc., R. R.*, 105 Wis. 300, 81 N. W. 416; *Missouri, etc., R. R. v. White*, 22 Tex. Civ. App. 424, 55 S. W. 593. A conductor is placed in a position of responsible control by the company and he is bound to exercise the greatest care in seeing to the safety of the passengers. He is invested with such apparent authority over them as, reasonably, to induce their confidence in, and compliance with, his directions and, as well, their reliance upon his acts. The situation in this case, it is true, was not such as to suggest any serious danger to the plaintiff in leaving the car, but, when the conductor assumed to extend his aid in doing so, she had the right to accept it, and to rely upon his act being a careful one. In the abstract the instruction asked for was correct, that the company was not liable for carelessness in the performance by its servant of a gratuitous courtesy to the plaintiff, but, as requested, the jurors could only have understood it as referring to the situation which was presented by the evidence. Therefore, as applied to the facts, it was correctly refused.

I think we must reach the conclusion that, while the defendant was under no obligation to supply the aid of a servant in assisting the plaintiff to descend from the car, yet, as the conductor undertook to do so, she had the right to rely upon that official's careful performance of his undertaking, and to hold the defendant responsible for any failure on his part to use reasonable care.

The judgment appealed from should be affirmed, with costs.

CULLEN, C. J., and O'BRIEN, EDWARD T. BARTLETT, WERNER, HISCOCK, and CHASE, JJ., concur.

Judgment affirmed.

TEXAS & PACIFIC RAILWAY COMPANY, Plff. in Err., v. ABILENE
COTTON OIL COMPANY.

(Argued November 2, 1906. Decided February 25, 1907.)

[27 Sup. Ct. Rep. 350.]

Error to State Court—Federal Question.—The question whether a state court, consistently with the act to regulate commerce, can grant relief to a shipper because of the exaction by a common carrier of an alleged unreasonable freight rate for an interstate shipment, when such rate has been filed with the Interstate Commerce Commission and promulgated as provided by the act to regulate commerce, and has not been found to be unreasonable by the Commission, will sustain a writ of error from the Federal Supreme Court to a state court, where such question was presented by the pleadings, was passed upon by the trial court, was expressly and necessarily decided by the highest state court, and is essentially involved in the case.

Error to State Court—Question Reviewable.—The question whether a schedule of interstate freight rates filed with the Interstate Commerce Commission was posted as required by the act to regulate commerce is not open in the Supreme Court of the United States on writ of error to a state court, where the latter court in effect declared that such schedule was conceded to have been filed and published in conformity with the statute, and it does not appear that if the court, having the evidence before it, had not treated the case as presented, it might not have considered the facts in relation to the publication of the schedule, and affirmatively found acts compelling the conclusion that the statute had been complied with, even if such inference was not sufficiently sustained by the findings of the trial court which the appellate court adopted.

Carriers—Remedy for Exacting Unreasonable Interstate Rate—Necessity of Action by Interstate Commerce Commission.—A shipper cannot maintain an action against a common carrier to obtain relief from an alleged unreasonable freight rate exacted from him for an interstate shipment, without reference to any previous action by the Interstate Commerce Commission, where such rate has been filed with that Commission and promulgated as provided by the act to regulate commerce, and is the rate which it is the duty of the carrier, under that act, to enforce against shippers until changed in accordance with the provisions of that statute, since the independent right of an individual originally to maintain action to obtain pecuniary redress for violations of the act, conferred by § 9, must be confined to such wrongs as can, consistently with the context of the act, be redressed without previous action by the Commission, and the provision of § 22, that nothing therein "shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies," cannot be construed as continuing in shippers a common-law right the continued existence of which would be absolutely inconsistent with the provisions of the statute.

In Error to the Court of Civil Appeals for the Second Supreme Judicial District for the State of Texas to review a judgment which reversed a judgment of the District Court of Taylor County, in that state, in favor of defendant in a suit to obtain relief from an alleged unreasonable interstate freight rate exacted by a common carrier from a shipper, and rendered judgment in favor of the plaintiff for the recovery of the ex-

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cessive charges. Reversed and remanded for further proceedings.

See same case below (Tex. Civ. App.) 85 S. W. 1052.

The facts are stated in the opinion.

Messrs. *David D. Duncan, John F. Dillon, Winslow S. Pierce, and Thomas J. Freeman* for plaintiff in error.

Mr. Hannis Taylor for defendant in error.

MR. JUSTICE WHITE delivered the opinion of the court:

The oil company, the defendant in error, sued to recover \$1,951.83. It was alleged that, on shipments of car loads of cotton seed, made in September and October, 1901, over the line of the defendant's road from various points in Louisiana east of Alexandria, in that state, to Abilene, Texas, the carrier had exacted, over the protest of the oil company, on the delivery of the cotton seed, the payment of an unjust and unreasonable rate, which exceeded, in the aggregate, by the sum sued for, a just and reasonable charge. There were, moreover, averments that the rate exacted was discriminatory, constituted an undue preference, and amounted to charging more for a shorter than for a longer haul. Besides a general traverse, the railway company defended on the ground that the shipments were interstate, and were, therefore, covered by the act of Congress to regulate commerce. It was averred that, as the rate complained of was the one fixed in the rate sheets which the company had established, filed, published, and posted, as required by that act, the state court was without jurisdiction to entertain the cause, and, even if such court had jurisdiction, it could not, without disregarding the act to regulate commerce, grant relief upon the basis that the established rate was unreasonable, when it had not been found to be so by the Interstate Commerce Commission.

The trial court made findings of fact. Those relating to the subject of the establishing, filing, and publishing by the railway company of rate sheets containing the rate which was complained of were as follows:

"7th. That the Western Classification Committee, agent and representative of numerous railways and of defendant, filed with the Interstate Commerce Commission what is known as the Western Classification, giving classifications of different articles or items of merchandise, and in same cotton seed is classed as 'A'; that this was the joint act of a number of roads, and the defendant adopted said joint classification; that on May 30, 1901, the Southwestern Freight Committee, agent of a number of roads and agent of defendant, filed with the said Commission a supplement for numerous roads in connection with defendant, whereby the rate on cotton seed from all points in Louisiana east of Alexandria was fixed at 67 cents per 100 pounds to all points in

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Texas from all points in Louisiana east of Alexandria and west of Alexandria.

"8th. That said classification and said rate schedule was adopted by defendant and was filed by said S. W. Freight Committee with said Interstate Commerce Commission in behalf of defendant.

"9th. That copies of said schedule and said tariffs and classifications were kept in the office of said defendant at said points of shipment and at said Abilene, that is, in the freight office and depots, for the inspection of the public, as admitted by plaintiff, which admission is found in the statement of facts.

"10th. That, other than said schedule and classification, nothing has been filed with the Interstate Commerce Commission by or in behalf of defendant in the way of classifications, schedules, or rates on cotton seed from points on its road in Louisiana to points on its road in Texas."

From the facts found the court stated the following as its conclusions

"1st. The facts so found show that this was an interstate shipment.

"2d. The facts so found show that the defendant complied with the interstate commerce law, and said rates and classifications were thereby properly established and in force, except that the rate charged on cotton seed in car load lots was unreasonable and excessive.

"3d. I find that the rate charged by the defendant was that established under the interstate commerce law."

As nothing in these conclusions relates to the averments of discrimination, undue preference, or a greater charge for a shorter than for a longer haul, those subjects, it may be assumed, were considered to have been eliminated in the course of the trial.

There was judgment for the railway company. When the controversy came to be disposed of by the court of civil appeals, to which the cause was taken, that court deemed there was only one question presented for decision; that is, whether, consistently with the act to regulate commerce, there was power in the court to grant relief upon the finding that the rate charged for an interstate shipment was unreasonable, although such rate was the one fixed by the duly published and filed rate sheet, and when the rate had not been found to be unreasonable by the Interstate Commerce Commission. In opening its opinion the court said (85 S. W. 1052):

"Adopting the construction of the pleadings evidently given them in the briefs, and treating it as presented, the case, briefly stated, is an action by appellant for damages for a violation of an alleged common-law right, in that appellee demanded and coercively collected from appellant freight charges in excess of a reasonable compensation, for the transportation of a number of car loads of cotton seed from the town of Cottonport and other

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designated towns in the state of Louisiana to the city of Abilene in the state of Texas."

After referring to the findings as to the unreasonableness of the charge exacted, and after pointing out that the railway company had not, by a cross assignment, challenged the correctness of the findings of the trial court as to the unreasonableness of the rate, it was said:

"So that we are relieved from a consideration of the difficulties discussed in some of the cases in ascertaining the fact, and therefore now have squarely before us the questions whether, in a state court, a shipper in cases of interstate carriage can, by the principles of the common law, be accorded relief from unjust and unreasonable freight rates exacted from him, or shall relief in such cases be denied merely because such unreasonable rate has been filed and promulgated by the carrier under the interstate commerce act?"

Proceeding in an elaborate opinion to dispose of the question thus stated to be the only one for consideration, the conclusion was reached that jurisdiction to grant relief existed, and that to do so was not repugnant to the act to regulate commerce. Applying these conclusions to the findings of fact, the relief prayed was allowed. The court said:

"We therefore adopt the trial court's findings of fact, and, applying thereto the principles of law we have deduced, reverse the judgment, and here render judgment in appellant's favor for the said sum of \$1,951.83, excessive freights charged, together with interest. * * *"

The assigned errors are addressed exclusively to the operation of the act to regulate commerce upon the jurisdiction of the court below to entertain the controversy, and its power in any event to afford relief to the oil company, based upon the alleged unreasonableness of the rate under the circumstances disclosed. Before we take up the consideration of that subject, however, two questions must be disposed of: First, it is insisted that this court is without jurisdiction, because no Federal question is presented. We think it suffices to say that it obviously results from the statements previously made that a question of that character was presented by the pleadings, was passed upon by the trial court, was expressly and necessarily decided by the court below, and is also essentially involved in the cause as it is before us. Second, it is urged that the effect of the act to regulate commerce upon the right of the oil company to recover need not be passed upon, since, even if error on that subject was committed below, a review of the decision in that regard is unnecessary, because, if the correct legal inference be drawn from the facts found by the trial court, which were adopted by the appellate court, it will result that the railway company had not established a legal schedule of rates in compliance with the act to regulate commerce, and therefore the jurisdiction of the court and its right to afford relief was not at all affected by the

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provisions of the act. We do not presently stop to consider whether the consequences as to jurisdiction and right to recover which are asserted would result if the premise was well founded, because we think the premise is either shown by the findings to be unfounded or it is not open for contention on the record. The premise rests upon two propositions of fact: a. That the findings of the trial court show that the rate sheet filed was joint and therefore did not necessarily relate to a shipment entirely over the road of the railway company. This contention, we think, is shown by the findings to be without merit, since those findings clearly point out that the rate sheet was filed by an agent of the defendant railroad, was by it adopted, and constituted the only rate sheet embracing the traffic in question b. Although it is conceded that the evidence showed that the schedule of rates was established and filed with the Interstate Commerce Commission, and was kept at the stations of the railway company for public inspection, and that the oil company had knowledge of the fact, it is insisted that the facts found do not justify the conclusion that there was a compliance with the requirements of the act to regulate commerce as to the posting of the established schedule. We think this contention is not open on this record. As we have seen, the trial court expressly concluded that the railway company had complied with the act to regulate commerce in the matter of filing, etc., its schedule of rates, and the appellate court opened its opinion by the statement that the course of the trial and the briefs of counsel confined the issue for determination to the question of the effect of the act to regulate commerce upon the rights of the parties, manifestly upon the assumption that the correctness of the conclusion of the trial court as to compliance with the act was conceded by both parties. In other words, as the court below, in deciding the case, expressly declared that the course of the arguments and briefs of counsel before it had confined the case to the issue of whether there was a right to recover upon the hypothesis that a schedule of rates had been filed and published, we do not think that it is now open to contend that that which the court below in effect declared was conceded in the briefs of counsel to be a lawful schedule of rates was not such. *Non constat*, that if the court of civil appeals, having the evidence before it, had not treated the case as presented, it might not have considered the facts in relation to the publication of the schedule and affirmatively found facts inevitably compelling the conclusion that the act to regulate commerce had been fully complied with, even if such inference was not sufficiently sustained by the findings of the trial court which the appellate court adopted. Because we thus find the question not open for consideration we must not be considered as conceding the correctness of the conclusion attempted to be drawn from the supposed failure to post.

We are thus brought to the underlying proposition in the

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case,—*viz.*, the effect of the act to regulate commerce upon the claim asserted by the oil company. As presented below and pressed at bar, the question takes a seemingly two-fold aspect,—the jurisdiction of the court below as affected by the act to regulate commerce and the right to the relief sought consistently with that act, even if jurisdiction existed. We say that these questions are only seemingly different, because they present but different phases of the fundamental question, which is the scope and effect of the act to regulate commerce upon the right of a shipper to maintain an action at law against a common carrier to recover damages because of the exaction of an alleged unreasonable rate, although the rate collected and complained of was the rate stated in the schedule filed with the Interstate Commerce Commission and published according to the requirements of the act to regulate commerce, and which it was the duty of the carrier under the law to enforce as against shippers. We come, therefore, first, to the consideration of that subject.

Without going into detail, it may not be doubted that, at common law, where a carrier refused to receive goods offered for carriage except upon the payment of an unreasonable sum, the shipper had a right of action in damages. It is also beyond controversy that, when a carrier accepted goods, without payment of the cost of carriage or an agreement as to the price to be paid, and made an unreasonable exaction as a condition of the delivery of the goods, an action could be maintained to recover the excess over a reasonable charge. And it may further be conceded that it is now settled that even where, on the receipt of goods by a carrier, an exorbitant charge is stated, and the same is coercively exacted, either in advance or at the completion of the service, an action may be maintained to recover the overcharge. 2 Kent, Com. 599, and note a; 2 Smith, Lead. Cas., pt. 1, 8th ed. (Hare & W. notes) p. 457.

As the right to recover, which the court below sustained, was clearly within the principles just stated, and as it is conceded that the act to regulate commerce did not, in so many words, abrogate such right, it follows that the contention that the right was taken away by the act to regulate commerce rests upon the proposition that such result was accomplished by implication. In testing the correctness of this proposition we concede that we must be guided by the principle that repeals by implication are not favored, and, indeed, that a statute will not be construed as taking away a common-law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory.

Both parties concede that the question for decision has not been directly passed upon by this court, and that its determination is only persuasively influenced by adjudications of other

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courts. They both, hence, mainly rely upon the text of the act to regulate commerce as it existed at the time the shipments in question were made. The case, therefore, must rest upon an interpretation of the text of the act and is measurably one of first impression.

Let us, without going into detail, give an outline of the general scope of that act, with the object of fixing the rights which it was intended to conserve or create, the wrongs which it proposed to redress, and the remedies which the act established to accomplish the purposes which the lawmakers had in view.

The act made it the duty of carriers subject to its provisions to charge only just and reasonable rates. To that end the duty was imposed of establishing and publishing schedules of such rates. It forbade all unjust preferences and discriminations, made it unlawful to depart from the rates in the established schedules until the same were changed as authorized by the act, and such departure was made an offense punishable by fine or imprisonment, or both, and the prohibitions of the act and the punishments which it imposed were directed not only against carriers but against shippers, or any person who, directly or indirectly, by any machination or device, in any manner whatsoever, accomplished the result of producing the wrongful discriminations or preferences which the act forbade. It was made the duty of carriers subject to the act to file with the Interstate Commerce Commission created by that act copies of established schedules, and power was conferred upon that body to provide as to the form of the schedules, and penalties were imposed for not establishing and filing the required schedules. The Commission was endowed with plenary administrative power to supervise the conduct of carriers, to investigate their affairs, their accounts, and their methods of dealing, and generally to enforce the provisions of the act. To that end it was made the duty of the district attorneys of the United States, under the direction of the Attorney General, to prosecute proceedings commenced by the Commission to enforce compliance with the act. The act specially provided that whenever any common carrier subject to its provisions "shall do, cause to be done, or permit to be done, any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter, or thing in this act required to be done, such common carrier shall be liable to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act. * * *" [24 Stat. at L. 382, chap. 104, § 8, U. S. Comp. Stat. 1901, p. 3159.] Power was conferred upon the Commission to hear complaints concerning violations of the act, to investigate the same, and, if the complaints were well founded, to direct not only the making of reparation to the injured persons, but to order the carrier to desist from such violation in the future. In the event of the failure of a carrier to obey the order of the Commission, that

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body, or the party in whose favor an award of reparation was made, was empowered to compel compliance by invoking the authority of the courts of the United States in the manner pointed out in the statute, prima facie effect in such courts being given to the findings of fact made by the Commission. By the 9th section of the act it was provided as follows:

"That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may either make complaint to the Commission, as hereinafter provided for, or may bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act, in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must, in each case, elect which one of the two methods of procedure herein provided for he or they will adopt. * * *"

And by § 22, which we shall hereafter fully consider, existing appropriate common-law and statutory remedies were saved.

When the act to regulate commerce was enacted there was contrariety of opinion whether, when a rate charged by a carrier was, in and of itself reasonable, the person from whom such a charge was exacted had at common law an action against the carrier because of damage asserted to have been suffered by a discrimination against such person or a preference given by the carrier to another. *Parsons v. Chicago & N. W. R. Co.*, 167 U. S. 447, 455, 42 L. Ed. 231, 234, 17 Sup. Ct. Rep. 887; *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 275, 36 L. Ed. 699, 703, 4 Inters. Com. Rep. 92, 12 Sup. Ct. Rep. 844. That the act to regulate commerce was intended to afford an effective means for redressing the wrongs resulting from unjust discrimination and undue preference is undoubted. Indeed, it is not open to controversy that to provide for these subjects was among the principal purposes of the act. *Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 494, 42 L. Ed. 243, 251, 17 Sup. Ct. Rep. 896. And it is apparent that the means by which these great purposes were to be accomplished was the placing upon all carriers the positive duty to establish schedules of reasonable rates which should have a uniform application to all, and which should not be departed from so long as the established schedule remained unaltered in the manner provided by law. *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. Ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700, 167 U. S. 479, 42 L. Ed. 243, 17 Sup. Ct. Rep. 896.

When the general scope of the act is enlightened by the considerations just stated it becomes manifest that there is not only a relation, but an indissoluble unity, between the provision for the establishment and maintenance of rates until corrected in accordance with the statute and the prohibitions against preferences and discrimination. This follows, because, unless the

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requirement of a uniform standard of rates be complied with, it would result that violations of the statute as to preferences and discrimination would inevitably follow. This is clearly so, for if it be that the standard of rates fixed in the mode provided by the statute could be treated on the complaint of a shipper by a court and jury as unreasonable, without reference to prior action by the Commission, finding the established rate to be unreasonable, and ordering the carrier to desist in the future from violating the act, it would come to pass that a shipper might obtain relief upon the basis that the established rate was unreasonable, in the opinion of a court and jury, and thus such shipper would receive a preference or discrimination not enjoyed by those against whom the schedule of rates was continued to be enforced. This can only be met by the suggestion that the judgment of a court, when based upon a complaint made by a shipper without previous action by the Commission, would give rise to a change of the schedule rate and thus cause the new rate resulting from the action of the court to be applicable in future as to all. This suggestion, however, is manifestly without merit, and only serves to illustrate the absolute destruction of the act and the remedial provisions which it created which would arise from a recognition of the right asserted. For if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that, unless all courts reached an identical conclusion, a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission, and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the Commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination, and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted. Indeed, no reason can be perceived for the enactment of the provision endowing the administrative tribunal which the act created with power, on due proof, not only to award reparation to a particular shipper, but to command the carrier to desist from violation of the act in the future, thus compelling the alteration of the old or the filing of a new schedule, conformably to the action of the Commission, if the power was left in courts to grant relief on complaint of any shipper, upon the theory that the established rate could be dis-

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regarded and be treated as unreasonable, without reference to previous action by the Commission in the premises. This must be, because, if the power existed in both courts and the Commission to originally hear complaints on this subject, there might be a divergence between the action of the Commission and the decision of a court. In other words, the established schedule might be found reasonable by the Commission in the first instance and unreasonable by a court acting originally, and thus a conflict would arise which would render the enforcement of the act impossible.

Nor is there merit in the contention that § 9 of the act compels to the conclusion that it was the purpose of Congress to confer power upon courts primarily to relieve from the duty of enforcing the established rate by finding that the same as to a particular person or corporation was so unreasonable as to justify an award of damages. True it is that the general terms of the section, when taken alone, might sanction such a conclusion, but, when the provision of that section is read in connection with the context of the act, and in the light of the considerations which we have enumerated, we think the broad construction contended for is not admissible. And this becomes particularly cogent when it is observed that the power of the courts to award damages to those claiming to have been injured, as provided in the section, contemplates only a decree in favor of the individual complainant, redressing the particular wrong asserted to have been done, and does not embrace the power to direct the carrier to abstain in the future from similar violations of the act; in other words, to command a correction of the established schedules, which power, as we have shown, is conferred by the act upon the Commission in express terms. In other words, we think that it inevitably follows from the context of the act that the independent right of an individual originally to maintain actions in court to obtain pecuniary redress for violations of the act, conferred by the 9th section, must be confined to redress of such wrongs as can, consistently with the context of the act, be redressed by courts without previous action by the Commission, and, therefore, does not imply the power in a court to primarily hear complaints concerning wrongs of the character of the one here complained of. Although an established schedule of rates may have been altered by a carrier voluntarily or as the result of the enforcement of an order of the Commission to desist from violating the law, rendered in accordance with the provisions of the statute, it may not be doubted that the power of the Commission would nevertheless extend to hearing legal complaints of, and awarding reparation to, individuals for wrongs unlawfully suffered from the application of the unreasonable schedule during the period when such schedule was in force.

And the conclusion to which we are thus constrained by an original consideration of the text of the statute finds direct support, first, in adjudged cases in lower Federal courts, and in the

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construction which the act has apparently received from the beginning in practical execution; and, second, is persuasively supported by decisions of this court, which, whilst not dealing directly with the question here presented, yet necessarily concern the same.

1. In *Swift & Co. v. Philadelphia & R. R. Co.*, 5 Inters. Com. Rep. 116, 64 Fed. 59, it was held that, in an action at law to recover damages for the exaction of an alleged unreasonable freight charge, the rate established in conformity with the act to regulate commerce must be treated by the courts as binding upon the shipper until regularly corrected in the mode provided by the statute. And in *Kinnavey v. Terminal R. Asso.*, 81 Fed. 802, in an able opinion, the question was carefully considered and the same doctrine was announced and applied. When it is considered that the act to regulate commerce was enacted in 1887, and that neither the diligence of counsel nor our own researches have brought into view any case except the one now under consideration holding that a court could, compatibly with the terms of that act, grant relief upon the basis that the established rate could be disregarded as unreasonable, it would seem to follow that the terms of the act had generally been treated in practical execution as incompatible with the existence of such power or right.

And this is greatly fortified when it is borne in mind that the reports of the decisions of the Interstate Commerce Commission show that many cases have been passed upon by that body concerning the unreasonableness of a rate fixed in an established schedule, which have resulted in awarding reparation to shippers and to the making of orders directing carriers to desist from future violation of the act; that is to say, in necessary legal effect, correcting established schedules.

2. The cases of *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 40 L. Ed. 935, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700; *Louisville & N. R. Co. v. Behlmer*, 175 U. S. 648, 44 L. Ed. 309, 20 Sup. Ct. Rep. 209; and *Interstate Commerce Commission v. Louisville & N. R. Co.*, 190 U. S. 275, 47 L. Ed. 1048, 23 Sup. Ct. Rep. 687, involved the enforcement against carriers of orders of the Commission. After deciding that the orders of the Commission were not entitled to be enforced because of errors of law committed by that body, this court declined to consider the question of the reasonableness per se of the rates as an original question; in other words, the correction of the established schedule without previous consideration of the subject by the Commission. It was pointed out that by the effect of the act to regulate commerce it was peculiarly within the province of the Commission to primarily consider and pass upon a controversy concerning the unreasonableness per se of the rates fixed in an established schedule. It was, therefore, declared to be the duty of the courts, where the Commission had not considered such a disputed question, to

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remand the case to the Commission to enable it to perform that duty,—a conclusion wholly incompatible with the conception that courts, in independent proceedings, were empowered by the act to regulate commerce, equally with the Commission, primarily to determine the reasonableness of rates in force through an established schedule.

In *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. Ed. 910, 15 Sup. Ct. Rep. 802, the facts were these: A rate had been fixed by a carrier in a bill of lading for an interstate shipment, which rate was less than that established under the provisions of the act to regulate commerce. On arrival of the goods at destination the carrier refused to deliver on tender of payment of the bill of lading rate, and demanded payment of and collected the higher established schedule rate. For so doing, the carrier was proceeded against under a statute of the state of Texas, imposing a penalty upon a carrier for charging more than the rate fixed in a bill of lading. A judgment of the state court, enforcing the penalty, was reversed, upon the ground that the state statute, as applied, was repugnant to the act to regulate commerce, the court saying (p. 102, L. Ed. p. 911, Sup. Ct. Rep. p. 803):

“The carrier cannot obey one statute without sometimes exposing itself to the penalties prescribed by the other. Take the case before us: If, in disregard of the joint tariff established by the defendant and the St. Louis & San Francisco Railway Company and filed with the Interstate Commerce Commission, the latter company, as a matter of favoritism, had issued this bill of lading at a rate less than the tariff rate, both the defendant company and its agent would, by delivering the goods upon the receipt of only such reduced rate, subject themselves to the penalties of the national law; while, on the other hand, if the tariff rate was insisted upon, then the corporation would become liable for the damages named in the state act. In case of such a conflict the state law must yield.”

In *Texas & P. R. Co. v. Mugg*, 202 U. S. 242, 50 L. Ed. 1011, 26 Sup. Ct. Rep. 628, the facts were as follows: On an interstate shipment a given rate, less than the lawful schedule rate, was quoted to the shipper by the agent of the railroad at the point of shipment. On the arrival of the goods at their destination the road exacted the schedule rate, whilst the shipper insisted he was entitled to the lower and quoted rate. And a recovery of the excess collected over the quoted rate was allowed by a court of the state of Texas. Reversing the judgment, it was here held that the rate fixed in the schedule filed pursuant to the act to regulate commerce was controlling, that it was beyond the power of the carrier to depart from such rates in favor of any shipper, and that the erroneous quotation of rates made by the agent of the railroad did not justify recovery, since to do so would be, in effect, enabling the shipper, whose duty it was to ascertain

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the published rate, to secure a preference over other shippers, contrary to the act to regulate commerce.

In view of the binding effect of the established rates upon both the carrier and the shipper, as expounded in the two decisions of this court just referred to, the contention now made, if adopted, would necessitate the holding that a cause of action in favor of a shipper arose from the failure of the carrier to make an agreement, when, if the agreement had been made, both the carrier and the shipper would have been guilty of a criminal offense and the agreement would have been so absolutely void as to be impossible of enforcement. Nor is there force in the suggestion that a like dilemma arises from the recognition of power in the Commission to award reparation in favor of an individual because of a finding by that body that a rate in an established schedule was unreasonable. As we have shown, there is a wide distinction between the two cases. When the Commission is called upon, on the complaint of an individual, to consider the reasonableness of an established rate, its power is invoked not merely to authorize a departure from such rate in favor of the complainant alone, but to exert the authority conferred upon it by the act, if the complaint is found to be just, to compel the establishment of a new schedule of rates applicable to all. And like reasoning would be applicable to the granting of reparation to an individual after the establishment of a new schedule because of a wrong endured during the period when the unreasonable schedule was enforced by the carrier and before its change and the establishment of a new one. In other words, the difference between the two is that which, on the one hand, would arise from destroying the uniformity of rates which it was the object of the statute to secure, and, on the other, from enforcing of that equality which the statute commands.

But it is insisted that, however, cogent may be the views previously stated, they should not control, because of the following provision contained in § 22 of the act to regulate commerce, viz.: “* * * Nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies.” This clause, however, cannot in reason be construed as continuing in shippers a common-law right, the continued existence of which would be absolutely inconsistent with the provisions of the act. In other words, the act cannot be held to destroy itself. The clause is concerned alone with rights recognized in or duties imposed by the act, and the manifest purpose of the provision in question was to make plain the intention that any specific remedy given by the act should be regarded as cumulative, when other appropriate common-law or statutory remedies existed for the redress of the particular grievance or wrong dealt with in the act.

The proposition that, if the statute be construed as depriving courts generally, at the instance of shippers, of the power to

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grant redress upon the basis that an established rate was unreasonable without previous action by the Commission great harm will result, is only an argument of inconvenience which assails the wisdom of the legislation or its efficiency, and affords no justification for so interpreting the statute as to destroy it. Even, however, if, in any case, we were at liberty to depart from the obvious and necessary intent of a statute upon considerations of expediency, we are admonished that the suggestions of expediency here advanced are not shown on this record to be justified. As we have seen, although the act to regulate commerce has been in force for many years, it appears that, by judicial exposition and in practical execution, it has been interpreted and applied in accordance with the construction which we give it. That the result of such long-continued, uniform construction has not been considered as harmful to the public interests is persuasively demonstrated by the fact that the amendments which have been made to the act have not only not tended to repudiate such construction, but, on the contrary, have had the direct effect of strengthening and making, if possible, more imperative, the provisions of the act requiring the establishment of rates and the adhesion by both carriers and shippers to the rates as established until set aside in pursuance to the provisions of the act. Thus, by § 1 of the act approved February 19, 1903, commonly known as the Elkins act [32 Stat. at L. 847, chap. 708, U. S. Comp. Stat. Supp. 1905, p. 599], which, although enacted since the shipments in question, is yet illustrative, the wilful failure upon the part of any carrier to file and publish "the tariffs or rates and charges," as required by the act to regulate commerce and the acts amendatory thereof, "or strictly to observe such tariffs until changed according to law," was made a misdemeanor, and it was also made a misdemeanor to offer, grant, give, solicit, accept, or receive any rebate from published rates or other concession or discrimination. And in the closing sentence of § 1 it was provided as follows:

"Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof, or participates in any rates so filed or published, that rate, as against such carrier, its officers, or agents, in any prosecution begun under this act, shall be conclusively deemed to be the legal rate, and any departure from such rate or any offer to depart therefrom shall be deemed to be an offense under this section of this act."

And, by § 3, power was conferred upon the Interstate Commerce Commission to invoke the equitable powers of a circuit court of the United States to enforce an observance of the published tariffs.

Concluding, as we do, that a shipper seeking reparation predicated upon the unreasonableness of the established rate must under the act to regulate commerce, primarily invoke redress

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through the Interstate Commerce Commission, which body alone is vested with power originally to entertain proceedings for the alteration of an established schedule, because the rates fixed therein are unreasonable, it is unnecessary for us to consider whether the court below would have had jurisdiction to afford relief if the right asserted had not been repugnant to the provisions of the act to regulate commerce. It follows, from what we have said, that the court below erred in the construction which it gave to the act to regulate commerce.

The judgment below is, therefore, reversed, and the case remanded for further proceedings not inconsistent with this opinion.

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(Court of Appeals of Kentucky, March 6, 1907.)

[100 S. W. Rep. 290.]

Carriers—Personal Injuries—Persons Accompanying Passengers—Notice of Character.*—Where a plaintiff accompanying two small children purchased a half-fare ticket and the agent asked if it was for a particular child, the other being evidently too young to pay fare, and she answered that it was, that she was sending the children to their mother, these facts, with the further fact that no ticket was bought for herself, were not sufficient to charge the ticket agent with notice that she was going aboard only to assist the children.

Same.*—Where a train stopped its usual length of time at a station, during which plaintiff, with baggage in her hand and without explaining her purpose, got on the train to assist her grandchildren, who were with her and were to be passengers, there was no notice to the trainmen that she did not intend to remain on the train.

Same—Contributory Negligence.†—Where plaintiff boarded a train to assist a passenger, her jumping off after the train started was contributory negligence precluding her recovery for injury.

Nunn, J., dissenting.

*For the authorities in this series on the subject of the duties and liabilities of carriers with respect to persons assisting or accompanying their passengers, see foot-note appended to *Southern Ry. Co. v. Patterson* (Ala.), 21 R. R. R. 283, 44 Am. & Eng. R. Cas., N. S., 283.

†See foot-notes appended to *Waller v. Wilmington City Ry. Co.* (Del. Sup'r Ct.), 21 R. R. R. 727, 44 Am. & Eng. R. Cas., N. S., 727; foot-note appended to *Fore v. Alabama & V. Ry. Co.* (Miss.), 21 R. R. R. 694, 44 Am. & Eng. R. Cas., N. S., 694; foot-notes appended to *Joyce v. Los Angeles Ry. Co.* (Cal.), 20 R. R. R. 66, 43 Am. & Eng. R. Cas., N. S., 66; *Baltimore, etc., R. Co. v. Mullen* (Ill.), 20 R. R. R. 6, 43 Am. & Eng. R. Cas., N. S., 6; foot-notes appended to *Alabama & V. Ry. Co. v. Jones* (Miss.), 19 R. R. R. 367, 42 Am. & Eng. R. Cas., N. S., 367; *Newlin v. Iowa Cent. R. Co.* (Iowa), 19 R. R. R. 360, 42 Am. & Eng. R. Cas., N. S., 360; foot-notes appended to *Cody v. Duluth St. Ry. Co.* (Minn.), 18 R. R. R. 117, 41 Am. & Eng. R. Cas., N. S., 117; foot-notes appended to *Behen v. St. Louis Transit Co.* (Mo.), 18 R. R. R. 103, 41 Am. & Eng. R. Cas., N. S., 103; *Boulfrois v. United Traction Co.* (Pa.), 18 R. R. R. 70, 41 Am. & Eng. R. Cas., N. S., 70; foot-notes appended to *Mearns v. Central R. R. (C. C. A.)*, 17 R. R. R. 97, 40 Am. & Eng. R. Cas., N. S., 97; *Kansas City, etc., R. Co. v. Matthews* (Ala.), 17 R. R. R. 79, 40 Am. & Eng. R. Cas., N. S., 79.

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Appeal from Circuit Court, Barren County.

"To be officially reported."

Action by Fanny Wilson against the Louisville & Nashville Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

Benjamin D. Warfield and Sims, DuBose & Rodes, for appellant.

J. Lewis Williams, for appellee.

SETTLE, J. This is an appeal from a judgment of the lower court entered upon a verdict awarding appellee \$300 damages for injuries sustained in alighting from appellant's passenger train. The recovery was had upon the ground that appellant's agents in charge of the train were guilty of negligence in starting it without notice to appellee, and without reasonable time or opportunity for her to get off the train before it got in motion. The answer contained a traverse and pleaded contributory negligence on the part of appellee; the latter plea was denied by reply. The accident occurred at Cave City, where appellee had gone with her two grandchildren to put them aboard appellant's train that they might be carried to their mother in Louisville. According to appellee's own testimony, when she got to the depot with her grandchildren, she bought of appellant's ticket agent, Curd, a half-fare ticket for one of them, but got no ticket for the other, as, under appellant's rules, it was entitled to free transportation. When the train arrived and stopped at Cave City, appellant took the children into the apartment of the coach reserved for colored passengers, where they belonged, but, finding the seats taken therein, she led the children into the smoker's section of the coach, and, upon reaching the first vacant seat, discovered that the train was in motion, whereupon she at once deposited their baggage, consisting of two baskets and a parcel, and leaving the children, hastened to the platform of the coach, from a step of which, though the train was still in motion, she jumped to the depot platform, thereby breaking the bones of one of her ankles.

It is not apparent from the evidence that the children were incapable of entering the coach and finding seats without assistance, for they had frequently traveled from Louisville to their grandmother's and back to Louisville, but the evidence did conduce to prove that they were unable to carry into the car the large quantity of baggage accompanying them. We may, therefore, assume that it was necessary for appellee, or some one, to assist them upon the train with it, and that she had the right to enter the coach for that purpose, but that fact was not, of itself, sufficient to make appellant responsible for her injuries. We find the law thus announced in *Moore on Carriers*, p. 584: "There is no obligation upon the carrier to hold its train until every person not a passenger leaves the same, irrespective of the time of the stop made at the station. It is the duty of one

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who has assisted a passenger on board, if the train starts before he has had time to get off, to remain until he can make known his wish to get off, and, if he alight while the train is in motion, he does so at his own risk, and cannot maintain an action against the carrier for injuries received, unless he shows that he exercised due care and the carrier was negligent. It is not negligence for the carrier to start its train before such person has had time to get off, unless its servants had notice of his intention to do so." *Texas Pac. R. Co. v. McGilvany* (Tex. Civ. App.) 29 S. W. 67; *Dillingham v. Pierce* (Tex. Civ. App.) 31 S. W. 203; *McLarin v. Atlantic, etc., R.*, 85 Ga. 504, 11 S. E. 840; *Central R. R. v. Letcher*, 69 Ala. 106, 44 Am. Rep. 505; *Yarnell v. Kansas City R. Co.*, 113 Mo. 570, 21 S. W. 1, 18 L. R. A. 599; *Coleman v. Georgia R. & B. Co.*, 10 S. E. 498; *Keokuk Packet Co. v. Henry*, 50 Ill. 264. In *Little Rock & Fort Smith R. Co. v. Lawton* (Ark.) 18 S. W. 543, 15 L. R. A. 434, 29 Am. St. Rep. 48, the facts were very similar to those of the case at bar. Lawton had taken the hand baggage of a lady and child into the car, and in alighting after the train started was injured. His main contention was that the train did not stop a reasonable length of time to permit him to alight. The trial court instructed the jury that it was the duty of those in charge of the train to hold it the full length of time that was usually required for passengers to get on or off the cars at that place. In passing on this contention the Supreme Court of Arkansas in part said: "But one who goes upon the train to render necessary assistance to a passenger in conformity to a practice approved, or acquiesced in, by the carrier, in its interest and upon its implied invitation as before stated, has a right to render the needful assistance and leave the car, and the railroad company, in permitting him to enter it with knowledge of his purpose, is presumed to agree that he may execute it, and is bound to hold the train a reasonable time therefor. *Griswold v. Chicago & N. W. R. Co.*, 64 Wis. 652, 26 N. W. 101. But the duty is dependent upon the knowledge of his purpose by those in charge of the train, for without such knowledge they may reasonably conclude that he entered to become a passenger, and cause the train to be moved after allowing him a reasonable time to get aboard. The law could not, in reason or justice, impose as a duty the doing of that which, in the light of everything known to trainmen, would not appear necessary or proper, or hold that the cars should be stopped when there was no reason to stop them except a fact unknown to them. * * *

The doctrine announced in the cases supra was approved by this court in *Berry v. L. & N. R. R. Co.*, 60 S. W. 699, 22 Ky. Law Rep. 1410. Berry, having gone into a passenger car to bid his family good-bye on their departure for Florida, attempted to alight from the train while it was in motion and was thrown under it and injured, for which he sought to recover damages of the railroad company. This court, after reviewing the authorities, supra, and others

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cited in the case, in part said: "From these and numerous decisions bearing upon this question, we think it is clear that, if appellee had either actual or constructive notice that appellant had gone into the car for the purpose of seating his wife and children, and that he intended to get off before the train started, it was their duty to have given him notice before starting the train, and to have held it long enough for him to get off with safety, but, in the absence of such notice, no obligation existed upon their part. * * *" In the more recent case of *Bishop v. I. C. R. R. Co.*, 77 S. W. 1099, 25 Ky. Law Rep. 1363, the court, following *L. & N. R. R. Co. v. Crunk*, 119 Ind. 549, 21 N. E. 31, 12 Am. St. Rep. 443, held that the question of the railroad company's liability should have been left to the jury, as the evidence conduced to prove that Bishop had entered the car to assist an invalid woman by direction of the conductor of the train, who, under such circumstances, should have held the train a reasonable time for him to get off, or in any event have given him notice when it was about to start.

It is appellee's contention that appellant did have notice of her entering the car and the purpose for which she did so, and that, with such knowledge, its servants in charge of the train started it without notice to her, and also without stopping it the customary or reasonable time. The alleged notice of her purpose in entering the car, she claimed, was given to Curd, the ticket agent, when she bought the half ticket for the older of the two children. She testified that the children were then with her, and were known to, and seen by, Curd, who asked her if she wanted the ticket for the boy, and that she answered in the affirmative and told him she was going to send them to their mother in Louisville, and these facts, with the further fact that she did not get a ticket for her own use, it is insisted, was notice to him, and through him to the appellant, that the children would have to be assisted on the train and that she was not going to Louisville with them. It was not stated by appellee, or claimed by her counsel, that she told the ticket agent she was not going to Louisville with the children, and the purchase of a ticket by her was not a condition precedent to her right to enter the train as a passenger for Louisville, but, assuming that her failure to get for herself a ticket gave, or ought to have given, the agent information that she would not accompany her grandchildren to Louisville, it was not notice to him that they would not be placed by her in charge of some one then in Cave City, or whom she expected to be on the train when it arrived. Nor do these alleged facts create the presumption that the ticket agent knew, or ought to have known, that it would be necessary for the children to be assisted into the car. As it was not claimed by appellee that the ticket agent saw or was told what quantity of baggage they had, what reason had he for knowing that they were encumbered with baggage which they could not carry into the car? In view of the manifold duties required of the ticket agent, and in the

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absence of a direct request from appellee that he inform the conductor that she would have to be allowed to assist her grandchildren on the train and given time to do so, it cannot fairly be claimed that he was charged with such duty, or knew that it was expected of him.

The evidence failed to show that the conductor or brakeman were neglectful of their duties. The former, after seeing the passengers who were to get off at Cave City leave the train, went to the front end of the train to assist in removing a corpse from the baggage car. One of the brakemen assisted, as was customary and proper, in securing water from the tank for the locomotive, the other was in his place on the station platform, somewhere between the smoker and ladies' coach, assisting passengers entering or leaving the cars. Evidently this brakeman was the one seen by appellee when she boarded the train with her grandchildren. Both the conductor and brakeman denied that they saw appellee get on the train, or knew she was on it or that they had notice of her purpose to leave the car. From their testimony, as well as that of practically nearly all the witnesses, it appears that, on the occasion in question, the train remained at Cave City the usual stopping time, which was about four minutes, and that, just before the train started, the conductor called out the usual warning, "All aboard." Manifestly, the stop was long enough to let the usual number of passengers on and off the train, allow time for taking the corpse from the baggage car, and to supply the locomotive with water. There could not, therefore, have been any undue haste in starting the train. According to the evidence appellee knew that it was customary for this train to stop at Cave City from two to four minutes, and that, when it took water there, which it rarely missed doing, the full time allowed for the stop was usually consumed. With this knowledge, she ought to have timed her going upon, and getting off, the train accordingly, or, if she had reason to believe that the train would not stop long enough to enable her to assist the children into a car, find them a seat, and deposit their baggage, she should have notified the conductor or a brakeman of the purpose for which she was about to enter the car, or have requested him or them to take the baggage into the car and assist the children to a seat therein. She admitted that neither of these things was done by her, although there was, as she testified, a brakeman of the train standing near her when she got on the coach. This being true, it is but reasonable to presume that the brakeman supposed she was entering the coach as a passenger, and, as she was carrying the baggage for the children and had them in charge, there was nothing in the appearance or situation of the parties that required additional assistance from him, or that gave him information that appellee was not entering the car as a passenger. In brief, the facts supplied by the evidence were not sufficient to constitute actual or constructive notice to the ticket agent

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or trainmen that appellee was not a passenger, or that it was her purpose to leave the car after assisting the children to a seat and depositing their baggage. Therefore, no negligence on the part of appellant's ticket agent or trainmen was shown by the evidence, and, appellee's injuries having resulted solely from her own negligence, the jury should have been peremptorily instructed to find for appellant.

It is not claimed that appellant's servants in charge of the train knew, or by the exercise of ordinary care could have known, of appellee's purpose to jump therefrom, in time to stop the train, and thereby prevent her injuries.

It follows from what has been said that the instructions given by the court were altogether erroneous.

Judgment reversed, and cause remanded for a new trial and further proceedings consistent with the opinion.

NUNN, J., dissents.

STATE *ex rel.* CHICAGO & N. W. RY. CO v. HARRINGTON, District Judge.

(Supreme Court of Nebraska, Feb. 21, 1907.)

[110 N. W. Rep. 1016.]

Mandamus—Procedure—Petition—Filing—Notice.—An action to procure the issuance of a writ of mandamus is not begun until a motion and affidavit, or a petition verified positively, is filed in the district court, and a notice that a person named therein will at a certain time and place apply for such a writ, served before any papers have been filed, does not confer jurisdiction to issue a peremptory writ in a case where notice must be given.

Same—Peremptory Writ.—It is only where there is no room for controversy as to the right of the applicant, and where from the nature of the facts set forth in the affidavit a court can take judicial knowledge that a valid excuse cannot be given, that a peremptory writ of mandamus may issue without notice.

Same.—A court has no power to issue a peremptory mandamus without notice in an action brought to compel a railroad company to furnish cars to a shipper at a certain time and place, since it cannot be "apparent that no valid excuse can be given."

(Syllabus by the Court.)

Application by the state, on relation of the Chicago & Northwestern Railway Company, for writ of mandamus to James J. Harrington, district judge. Writ allowed.

B. T. White and *C. C. Wright*, for relator.

M. F. Harrington, for respondent.

LETTON. J. The relator is a railroad corporation owning and operating a line of railroad in Nebraska through the village of Emmett, in Holt county. The respondent is judge of the district court of Holt county. On the 31st day of December, 1906, the respondent, as such judge, issued a peremptory writ of mandamus to the railroad company, on the application

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of one Wilson, commanding it immediately to furnish Wilson three cars in which to load and ship 30 tons of hay from Emmett to Lincoln, Neb., and also rendered judgment against the relator for \$6.85, costs incurred. No alternative writ was issued and served upon the company, nor was any order to show cause issued and served, but on December 29th a notice was served by Wilson upon the agent of the railroad company at O'Neill, substantially to the effect that he would apply to the district court of Holt county, Neb., at 10 o'clock in the forenoon, on the 31st day of December, 1906, for a peremptory writ of mandamus compelling it to furnish him immediately seven cars in which to ship hay from Emmett, Neb., to Lincoln, Neb. The relator contends that the order allowing the writ was made without power or jurisdiction, and prays for a writ to compel the respondent to set aside the order awarding the same, and the judgment for costs. The relator in its application sets up a good and sufficient defense to the mandamus proceedings in Holt county, and further alleges that it has furnished at Emmett, to all shippers without discrimination, all the cars it was able to supply. The respondent, in answer to the alternative writ, sets forth the notice and application of Wilson and the default of the railroad company to appear at the time and place specified in the notice, and alleges that a hearing was then and there had and judgment entered, and that the court had jurisdiction to award the peremptory writ applied for; that Wilson made a case authorizing the granting of a peremptory writ without first issuing an alternative writ; and that the court determined the existence of such right, and its judgment is not subject to collateral attack. To this answer the relator has filed a general demurrer, and the cause is submitted upon the question whether the allegations of the answer are sufficient to constitute a defense.

1. The relator contends that under the rule in *Horton v. State*, 60 Neb. 701, 84 N. W. 87, the district court of Holt county had no power or authority to issue a peremptory writ of mandamus against the relator without the issuance of an alternative writ. In the *Horton* Case it was held that the statute authorizing the issuance of a peremptory writ of mandamus without notice has reference to cases in which the refusal of a public officer to discharge official duty is so obviously inexcusable, and the necessity for prompt action so imperative, that notice must be dispensed with in order to prevent a failure of justice, and that no such power can be exerted against a private corporation or its officers by which its functions are performed, since no person can be deprived of property or valuable rights without notice and opportunity for a hearing. The case was in effect an action to compel a private corporation to pay a debt, and it is clear that such a proceeding was beyond the proper purpose of the writ of mandamus. The relator in this case, however, is a public corporation. Extensive powers and rights have been

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conferred upon it by the state in return for its assumption of the obligation to serve the public. We think that there may perhaps be a distinction between the power of a court to compel the action of a public service corporation in a proper case by peremptory writ without notice and the power to exert the same authority over a private corporation in a matter in which the public has no concern. We think it unnecessary to determine in this action whether a peremptory writ may not be issued against a public corporation without notice if an emergency should arise apparently warranting such an unusual and drastic procedure.

2. If the district court of Holt county acquired jurisdiction over the defendant in the mandamus proceedings, the answer of the respondent is a complete defense, since its judgment cannot be attacked collaterally or reviewed in such a proceeding as this. It appears that on the 29th day of December, the date upon which the notice was served by Wilson, no application had been made to that court for a writ of mandamus, and no such application was filed until on the 31st day of December, two days after service of the notice, and that the writ was issued immediately. It was impossible, therefore, for the railroad company to ascertain until the time of hearing whether or not the notice was served in good faith, and whether, in fact, any application would ever be made to the district court for the issuance of a writ. It rested in the bosom of Wilson as to whether or not he would ever make such application. In its application in this court the relator alleges that a number of such notices have been served upon it by various parties at the village of Emmett, and that, when it appeared at the time and place specified in order to show cause, no application was in fact made to the court. This allegation is denied by the answer, and hence cannot be taken as admitted, and yet it is a fair example of what, in fact, might happen if a practice of this kind can be tolerated. It is argued by counsel for the respondent that a summons is not necessary in a mandamus case, and that, if the defendant received actual notice of the application, it will be sufficient. He concedes, however, that notice in some form must be given in such a case as this. Without determining the proper manner and form of such notice, or whether or not a notice of the form served by Wilson would be sufficient to confer jurisdiction if served after proceedings were actually begun, we think it clear that until proceedings had actually been begun by the filing in court of an application for the writ a notice that at some future time the relator would apply therefor has no substantial basis, and is of no effect whatever as a step in a legal proceeding; that, since it rested on the mere whim of the relator therein as to whether or not a proceeding would ever be begun, the railroad company was entitled to entirely disregard the same; and that such a notice served at such a time was insufficient to confer jurisdiction upon the district court and was a mere private paper.

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Section 648 of the Code of Civil Procedure provides: "When the right to require the performance of the act is clear and it is apparent that no valid excuse can be given for not performing it, a peremptory mandamus may be allowed in the first instance. In all other cases the alternative writ must be first issued." Section 649 provides: "The motion for the writ can be made upon affidavit and the court may require a notice of the application to be given to the adverse party or may grant an order to show cause why it should not be allowed, or may grant the writ without notice." Under these provisions an alternative writ, and not a peremptory writ, should be issued in the first case, or, if a peremptory writ is applied for, a notice to show cause why it should not issue should be given and a hearing had before its issuance. It is only where there is no room for controversy as to the right, and where from the nature of the facts set forth in the affidavit the court can take judicial knowledge that a valid excuse is impossible, that a writ may issue without notice. In *Home Ins. Co. v. Scheffer*, 12 Minn. 382 (Gil. 261), it is said: "The questions to be decided, in order to determine whether the right is clear and whether no valid excuse can be given, are: First, is this showing true? And, second, does the tribunal applied to know it to be true on account of the nature of the facts shown or from the admissions of the defendant?" The facts set forth in Wilson's application were of such a nature as to admit of controversy, and the railroad company might well have, and in this application alleges that it did have, a valid and sufficient defense thereto. In such a case a court has no power or jurisdiction to issue a peremptory writ without, first, the filing of the application in the court; and second, notice being given thereafter of the pendency of the same and of the time and place where the application will be heard. It was impossible for the district court to have knowledge that no valid excuse could be given for the railroad company not furnishing cars, and it had therefore no power to issue a peremptory writ without the defendant having been notified of the pending proceedings. As we have seen, the notice actually served was without legal foundation, and the writ issued was void.

The demurrer to the answer is therefore sustained, and the writ of mandamus allowed.

NEWPORT NEWS & O. P. RY. & ELECTRIC CO. v. MCCORMICK.

(Supreme Court of Appeals of Virginia, Jan. 31, 1907.)

[56 S. E. Rep. 281.]

Pleading—Objection to Evidence—Variance—Waiver.—Va. Code, 1904, § 3384, provides that, if at the trial there appears to be a variance between the evidence and allegations, the court, if justice will be promoted, may allow the pleadings to be amended, or direct the jury to find the facts, and, after such finding, if it considers the

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variance such as could not have prejudiced the opposite party, shall give judgment according to the rights of the case. Held that, where no objection was made to the admissibility of evidence and no motion made to exclude on account of a supposed variance, the objection must be considered on appeal as waived.

Trial—Instructions—Form.—Instructions should be concrete, and should not enunciate merely abstract propositions of law.

Appeal and Error—Harmless Error—Instructions.—The giving of an instruction enunciating merely an abstract proposition of law, instead of being concrete, is no ground for reversal, unless it appears that it was calculated to mislead or confuse the jury.

Trial—Instructions—Application to Evidence.—Where, in an action against a carrier for injuries to a passenger, the evidence for plaintiff showed the accident to be the result of the negligence of the motorman in prematurely starting the car when plaintiff was alighting, and the defense was that plaintiff stepped from the car while it was moving, an instruction that, though plaintiff was guilty of contributory negligence, yet, if the jury believed that the conductor knew of such negligence and could have avoided the accident, plaintiff's negligence would not defeat a recovery, was reversible error, as involving a hypothesis having no foundation in the evidence and tending to deprive the defendant of the defense of contributory negligence.

Carriers—Injury to Passenger—Contributory Negligence.*—Where the operatives of a street car negligently carry a passenger beyond his destination, such conduct does not absolve him from contributory negligence in jumping from the car while it is in motion.

Same—Questions for Jury.*—It is not negligence as a matter of law for a passenger to alight from a moving street car; but the question is for the jury under all the circumstances of the particular case.

Error to Corporation Court of Newport News.

Action by N. L. McCormick against the Newport News & Old Point Railway & Electric Company. Judgment in favor of plaintiff, and defendant brings error. Reversed, and remanded for a new trial.

E. M. Braxton and S. Gordon Cumming, for plaintiff in error.
Ashby & Read, for defendant in error.

WHITTLE, J. The plaintiff in error, the Newport News & Old Point Railway & Electric Company, brings this writ of error to

*For the authorities in this series on the question whether it is contributory negligence on the part of a passenger to alight from a moving train or car, see foot-notes appended to *Waller v. Wilmington City Ry. Co.* (Del. Sup'r Ct.), 21 R. R. R. 727, 44 Am. & Eng. R. Cas., N. S., 727; *Fore v. Alabama & V. Ry. Co.* (Miss.), 21 R. R. R. 694, 44 Am. & Eng. R. Cas., N. S., 694; foot-notes appended to *Joyce v. Los Angeles Ry. Co.* (Cal.), 20 R. R. R. 66, 43 Am. & Eng. R. Cas., N. S., 66; foot-notes appended to *Baltimore & O. S. W. R. Co. v. Mullen* (Ill.), 20 R. R. R. 6, 43 Am. & Eng. R. Cas., N. S., 6; foot-note appended to *Alabama & V. Ry. Co. v. Jones* (Miss.), 19 R. R. R. 367, 42 Am. & Eng. R. Cas., N. S., 367; *Newlin v. Iowa Cent. Ry. Co.* (Iowa), 19 R. R. R. 360, 42 Am. & Eng. R. Cas., N. S., 360, foot-notes appended to *Cody v. Duluth St. Ry. Co.* (Minn.), 18 R. R. R. 117, 41 Am. & Eng. R. Cas., N. S., 117; foot-notes appended to *Behen v. St. Louis Transit Co.* (Mo.), 18 R. R. R. 103, 41 Am. & Eng. R. Cas., N. S., 103; *Mearnes v. Central R. R.* (C. C. A.), 17 R. R. R. 97, 40 Am. & Eng. R. Cas., N. S., 97; *Kansas City, etc., R. Co. v. Matthews* (Ala.), 17 R. R. R. 79, 40 Am. & Eng. R. Cas., N. S., 79; *Boulfrois v. United Traction Co.* (Pa.), 18 R. R. R. 70, 41 Am. & Eng. R. Cas., N. S., 70.

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the judgment of the corporation court of the city of Newport News, awarding damages to the defendant in error, N. L. McCormick (who was plaintiff in the court below), in an action for personal injuries.

The first assignment of error is to the refusal of the court to grant an instruction founded upon an alleged variance between the declaration and proof. Of that assignment it is sufficient to observe that, no objection having been made to the admissibility of evidence, or no motion to exclude it on account of the supposed variance, the objection must be considered as having been waived. A different rule of practice would deprive the plaintiff in such case of the benefits of section 3384, Va. Code 1904. *Shenandoah Valley R. Co. v. Moose*, 83 Va. 827, 3 S. E. 796; *Bertha Zinc Co. v. Martin*, 93 Va. 791, 22 S. E. 869, 7 L. R. A. 777; *Richmond R., etc., Co. v. West*, 100 Va. 188, 40 S. E. 643; *Portsmouth St. R. Co. v. Peed's Adm'r*, 102 Va. 662, 47 S. E. 850; *Moore Lime Co. v. Johnston*, 103 Va. 84, 86, 48 S. E. 557.

The objection to instruction B, given at the instance of the plaintiff, is that it propounds only an abstract principle of law.

It is unquestionably true that instructions should be concrete, and ought not to enunciate merely abstract propositions of law (*N. & W. Ry. Co. v. Bell*, 104 Va. 836, 52 S. E. 700); but the violation of the rule will not constitute reversible error, unless the court can perceive that it was calculated to mislead or confuse the jury. *Reed v. Commonwealth*, 98 Va. 817, 36 S. E. 399.

The objection to instruction C, which the court also gave at the request of the plaintiff, is that there was no evidence to support it.

The instruction tells the jury "that, even though they may believe from the evidence that Mrs. McCormick was guilty of contributory negligence in attempting to leave the car while the same was in motion, still, if the jury shall further believe from the evidence that the conductor in charge of such car knew of such negligence on her part, and that it was dangerous to attempt to get off of the car while it was in motion, and that such conductor could, by the exercise of proper care, diligence, and precaution, have avoided the accident complained of, then the plaintiff's said negligence will not defeat a recovery."

The instruction was intended to illustrate the doctrine of the last clear chance, and is predicated upon the supposed negligence of the conductor in failing to exercise proper care to avoid the accident after the negligence of the plaintiff in attempting to leave the car while in motion became known to him. There was not only no evidence upon which to base that hypothesis, but the testimony of the plaintiff absolves the conductor from any negligence whatever, and ascribes the accident to the negligence of the motorman in prematurely starting the car at the moment she was attempting to alight. In the absence of evidence the

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manifest tendency of the instruction was to mislead the jury and to deprive the plaintiff in error of the defense of contributory negligence on the part of the court below. This was error. *Rocky Mount Tr. Co. v. Price*, 103 Va. 298, 49 S. E. 73; Va., etc., Co. v. Harris, 103 Va. 708, 717, 49 S. E. 991; *Jeremy Imp. Co. v. Commonwealth* (decided at the present term) 56 S. E. 224.

The court refused to instruct the jury, on behalf of the defendant, "that while it is the duty of a common carrier of passengers to stop its cars and allow a passenger reasonable time to alight therefrom, if requested to do so, yet a failure to stop when so requested does not justify a passenger in alighting or attempting to alight from a moving car; that it is the duty of the passenger under such circumstances to remain on the car until it has come to a stop and she can safely alight therefrom."

We are of opinion that the court did not err in refusing this prayer. It is certainly true as a general proposition that the misconduct of the conductor in carrying a passenger beyond his destination can afford no sufficient justification for his hazarding life or limb in jumping from a moving car. If, however, he should negligently persist in doing so and suffers injury, he is to be regarded as the author of his own misfortune, and his right to recover is barred, upon the principle that the negligence of the company in failing to stop the car was the remote, while the negligence of the plaintiff in leaping from the car while in motion was the proximate, cause of the injury. *Jamison v. C. & O. Ry. Co.*, 92 Va. 327, 23 S. E. 758, 53 Am. St. Rep. 813; *Washington, etc., R. Co. v. Lacey*, 94 Va. 460, 26 S. E. 834; *Blankenship v. C. & O. Ry. Co.*, 94 Va. 449, 27 S. E. 20; *Outen v. North & South St. Ry. Co. (Ga.)* 21 S. E. 710; *Houston & Texas Cent. Ry. v. Leslie*, 9 Am. & Eng. R. Cases, 407; *L. S. & Mich. So. Ry. v. Bangs*, 3 Am. & Eng. R. Cases, 426; *Cent. R., etc., Co. v. Letcher*, 12 Am. & Eng. R. Cases, 115; *Lee v. Elizabeth, P. & C. J. Ry. Co. (N. J. Sup.)* 55 Atl. 106.

The general rule, however, formulated in the rejected instruction, is subject to the qualification that the question of whether the passenger has been guilty of such negligence as would bar a recovery in the particular case is a mixed question of law and fact, to be submitted to the determination of the jury under proper instructions. Such conduct does not necessarily constitute negligence per se; the criterion being that if, under all the circumstances, an ordinarily prudent person would have been warranted in attempting to alight from a moving car, negligence ought not to be imputed to a passenger who pursues that course. 5 Am. & Eng. Enc. L. (2d Ed.) 669; *Booth on St. Rys.* § 337; *Filer v. N. Y. C. R. Co. (N. Y.)* 10 Am. Rep. 327; *St. L., etc., Ry. Co. v. Cantrell (Ark)* 40 Am. Rep. 105; *Lambeth v. N. C., etc., R. Co. (N. C.)* 8 Am. Rep. 508; *Western R. Co. v. Young*, 51 Ga. 489.

The other instructions offered by the defendant were intended

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to take advantage of the variance between the declaration and the evidence, and that question has been disposed of in connection with the first assignment of error.

The remaining assignments are not likely to arise at the next trial, and therefore need not be noticed.

For the misdirection of the jury in the particulars mentioned, the judgment must be reversed, the verdict of the jury set aside, and the case remanded for a new trial, to be had not in conflict with this opinion.

TURLEY v. ATLANTA, K. & N. RY. CO.

(Supreme Court of Georgia, Feb. 15, 1907.)

[56 Sup. Ct. Rep. 748.]

Carriers—Injuries to Passenger—Contributory Negligence—Leaving Moving Car.*—When the agent and employees of a railway company negligently fail to bring the train to a stop at a station where a passenger is entitled to leave the train, and the passenger, perceiving that he is about to be carried beyond his destination, attempts to alight from the car at the usual place of doing so at said station, and, while so attempting to alight, is by a sudden jerk thrown from the steps of the car and injured, he is not precluded from the recovery of damages for such injury, unless he was guilty of negligence himself, and his own negligence was the proximate cause of his injuries.

Same—Question for Jury.*—To leave a moving train under the circumstances just set forth cannot be held to be negligence as a matter of law, unless it appears further that the danger attending the attempt to alight was so great as to be obvious to a person of common prudence and ordinary intelligence. Ordinarily, in cases of this kind, the question of what is or is not negligence is one for the jury.

Damages—Pleading—Sufficiency.—A paragraph of the plaintiff's petition alleging, in general terms, that, "on account of said injuries, petitioner's medical bill, loss of time, and nurse's attention has caused, and is well worth, the sum of \$150, and he will continue to have medical attention for a long time to come," was subject to special demurrer upon the ground that "there is no itemized bill or bill of particulars of the medical bill, loss of time, or nurse's attention sued for."

(Syllabus by the Court.)

Error from Superior Court, Cobb County; Geo. F. Gober, Judge.

Action by W. P. Turley against the Atlanta, Knoxville & Northern Railway Company. From a judgment in favor of defendant, plaintiff brings error. Reversed.

Turley sued the Atlanta, Knoxville & Northern Railway Company to recover damages for personal injuries alleged to have been sustained in the following manner: "On the 29th day of November, 1904, petitioner was a passenger on defendant's pas-

*For the authorities in this series on the question whether it is contributory negligence in a passenger to alight from a moving car, see preceding case, and foot-notes.

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senger train that leaves Marietta, said county of Cobb, about 9.30 o'clock p. m., to go to Blackwell's Station on defendant's railway, in said county of Cobb. When said train arrived in about half a mile of said Blackwell's Station, the conductor and porter on said train called 'out, 'Blackwell's!' meaning thereby to notify petitioner that said train was approaching his destination, and for him to be ready to alight from the same at said station. Petitioner * * * immediately left his seat, went to the platform of the car, got on the lower step of the same as the train began to slow up, preparing to immediately alight from the train as soon as it stopped. The train slowed down, and, when the rear end of said coach that petitioner was on reached the public crossing at said station, which is the place where said train always stops for passengers to alight at said station, said train was running at about from four to five miles per hour. At this time petitioner was on the lower step of said coach, holding to the guard rails, preparing to alight from the train when it stopped, but the train did not stop, and immediately began to increase its speed, and petitioner, to avoid being carried beyond his destination, and availing himself of the opportunity that was offered him to alight, endeavored to get off the car while it was in motion and going at the rate of about four to five miles per hour as aforesaid, at the regular place for stopping at said station. Just as petitioner was about to step from the coach, with one foot on the lower step and the other being lowered to the ground, said train gave a sudden, quick jerk, causing petitioner to lose his balance and causing him to be thrown violently and with great force against the rail and cross-ties of the side-track on said crossing." The defendant filed both a general and a special demurrer. The court sustained the demurrer and dismissed the petition, and the plaintiff excepted.

W. A. Morris, for plaintiff in error.

Clay & Blair, for defendant in error.

BECK, J. (after stating the facts). 1, 2. Whether it is negligence or not for a passenger to leave a moving train cannot in every instance be decided as a matter of law. If it appears that at the time of a person's leaving a moving car it is obviously dangerous for him to do so, on account of its having attained a high rate of speed, the court might as a matter of law hold that in voluntarily leaving the car such person was guilty of such negligence as would preclude a recovery of damages for injuries received in alighting under those circumstances. In the present case, when the plaintiff left the train, it was moving at the comparatively slight speed of between four and five miles an hour. And because of that fact it is easily distinguishable from several cases cited in their brief by counsel for defendant. Discussing the precise question which we have before us in this case, Judge Thompson, in his Commentaries on the Law of Negligence, stated his views as follows: "It may there-

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fore be affirmed, on the one hand, that where a train stops at a station to which the company contracts to carry a passenger the company is liable if reasonable time to leave is not afforded, and the passenger is injured in an attempt to leave after it has started, and while in motion, if he does not in getting off incur a danger obvious to the mind of a reasonable man; and, on the other hand, that, although the company has failed in its duty of stopping the train at the station for a reasonable time to allow the passenger to alight, yet, if he attempts to do so after the train has acquired such a rapid motion as to make it obvious to a man acting reasonably under the same circumstances that an attempt to alight would be attended with danger, he cannot make the negligence of the company a ground for recovering damages from it in case he is hurt." 3 *Thomp. Neg.* 344. In the present case it is true the train did not come to a stop at the place at which passengers usually left the train for the station, which was the plaintiff's destination, but, after coming almost to a stop, the train began to increase its speed, and was "going at the rate of about four to five miles per hour" when the plaintiff attempted to alight, and having one foot on the step of the car, and the other being lowered to the ground, in consequence of the train's giving a "sudden, quick jerk," he was thrown violently to the earth. In so far as his right to recover is concerned, the plaintiff's case here cannot differ materially from that of a passenger who, because his train has not stopped a sufficient time to permit him to alight, attempts to do so after it is again in motion and has attained a speed equal to that at which the train in the present case was going. That the defendant company was negligent in not causing the train to come to a full stop, and to remain so until the passenger had alighted at the station to which his ticket entitled him to be carried, is beyond question; and the further question, as to whether or not, in causing the train to move with a quick, sudden jerk, just as it was passing the usual place for passengers to alight, the company was not guilty of another act of negligence, which resulted in injury to the passenger, should have been submitted to the jury.

We cannot agree with counsel for the defendant, who insist that the plaintiff "knew the train was running at a speed that made it hazardous to attempt to alight therefrom in the prevailing darkness," and "knew, more than this, that the train was not stopping, but was increasing its speed; and, with this situation clearly before him, 'chose not to avoid, but to risk the danger,'" and that consequently the plaintiff's injury was not the result of the defendant's negligence, but of his own recklessness. We admit that counsel are fortified in this position by the language of the decision in the case of *Simmons v. Seaboard Air-Line Railway*, 120 Ga. 225, 47 S. E. 570, and possibly by the ruling in that case upon the issue involved; but, if that decision conflicts with rulings made in this case, it must

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yield to older decisions by whose rulings we are controlled in the adjudication of the cause under consideration. In the case of *Suber v. Railway Co.*, 96 Ga. 42, 23 S. E. 387, the plaintiff entered a car for the purpose of assisting his children upon one of the regular passenger trains of the defendant company, and, when they were seated, started to get off, but the train began moving before he could do so. He proceeded down the steps to the platform and was about to step off, when the train gave a sudden jerk, which caused him to fall. The train was moving at the rate of about three miles an hour. The conductor knew the purposes for which the plaintiff had entered the car. The stop of the train at the station was shorter than usual, and it was put in motion without giving the usual signals. These facts appeared on the trial of the case in the testimony of the plaintiff, and, upon motion of the defendant, a nonsuit was granted; and it was there held that "the court erred in granting a nonsuit. It is not necessarily as matter of law negligent for a person to leave a moving train. Whether it is negligent or not in a particular case must depend upon the circumstances of danger attending the act and the special justification which the person leaving the train had for doing so. Ordinarily, in cases of this kind, the question of what is or is not negligence is one for the jury; and, unless the danger is obviously great—as where the train is moving at full speed—the court cannot hold that leaving the train is, as a matter of law, such negligence as should preclude a recovery." In the case last cited, in the opinion delivered by Chief Justice Simmons, authorities are cited sustaining the position taken, and several of the cases on the brief of counsel for the defendant in the instant case are referred to and distinguished. It is impossible for us, upon its material facts, to distinguish the *Suber Case* from the one we are considering. It is true that it does not appear in the *Suber Case* whether it was day or night when the plaintiff alighted from the moving train, and the speed in that case was only three miles per hour, and in this case was between four and five miles. But these minor differences are not so material and important as in the one case to make the question of the plaintiff's negligence one of fact for the jury, and in the other one of law for the court to decide. Judge Thompson in the same paragraph that we have cited above quotes approvingly the following extract from the dissenting opinion of Chief Baron Kelly in the case of *Siner v. Railway Co.*, L. R. 3 Exch. 150, 156: "I am clearly of opinion, however, that a railway company are not entitled to expose any passenger to the necessity of choosing between two alternatives, neither of which he could lawfully be called on to choose, namely, either to go on, or to take his chance of danger and jump out; and, if they do so, the choice is made at their peril. I agree that, if it can be clearly seen by the passenger that the act must be attended with injury, it may then be fairly contended that he is not entitled

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to choose this obviously and certainly dangerous alternative.
 * * * Yet, when he is called upon to choose between two evils to which the neglect of the company has exposed him, and one of which presents some degree of danger, but not such as he may not without imprudence encounter, if in consequence of his adopting that alternative he suffers any injury, that injury is the proper subject of an action against the company." And this the learned text-writer says, "is probably now recognized as the more correct exposition of the law than the views of the majority of the court in that case." Many cases are cited in the note to this paragraph, in which the language of Chief Baron Kelly is approved. And the same doctrine is laid down and numerous cases collected in *American Negligence Cases*, where there are also to be found many decisions laying down a contrary doctrine. And in the latest edition of *Hutchinson on Carriers* (section 1179) after having shown that the question under consideration has been decided differently by different courts, the author concludes that "the weight of modern authority seems to sustain the view that an attempt by the passenger to alight from a railway train while it is passing a place at which it should stop to enable him to alight, or at which it has failed to stop a reasonable time to permit him to leave it, will not as a matter of law be considered a negligent act, unless the attending circumstances so clearly show that he acted imprudently or rashly that reasonable minds could fairly arrive at no other conclusion, and that the question, whether the act of the passenger in so attempting to alight from the train was negligent—that is, whether he exercised for his safety that degree of care and caution which a person of ordinary prudence would be expected under like circumstances to exercise—must ordinarily be submitted to the jury." 3 *Hutch. Carriers* (3d Ed.) 1377, § 1179.

3. The ground of the special demurrer pointing out the defects of paragraph 8 of plaintiff's petition should have been sustained, as ruled in the third headnote.

The other grounds of the special demurrer were without merit.

Judgment reversed. All the Justices concur, except FISH, C. J., absent.

SAPPINGTON v. ATLANTA & W. P. R. Co.

(Supreme Court of Georgia, Dec. 17, 1906.)

[56 S. E. Rep. 311.]

Damages—Elements—Proximate Cause—Medical Expenses.*—The damages claimed because of the loss of the services and companionship of the plaintiff's wife, and because of the expenses incurred in

*For the authorities in this series on the subject of the elements of the damages recoverable by husband or wife for the death or

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giving her medical attention, were not the natural consequences of the alleged tortious acts, and were too remote to be the basis of recovery.

Same—Mental Suffering.†—Damages for mental anguish or wounded feelings arising solely from the circumstance that the passenger had been negligently carried beyond his destination are not recoverable, where he has sustained no injury to his person or his purse, by receiving bodily hurt or being subjected to insult, abuse or humiliation.

Carriers—Transportation of Passengers—Breach of Contract—Damages.‡—A passenger is entitled to recover of a railroad company at least nominal damages for negligently carrying him beyond his destination, and his suit should not be dismissed because he is not entitled to recover all the damages he claims.

(Syllabus by the Court.)

Error from Superior Court, Troup County; R. W. Freeman, Judge.

Action by Eugene Sappington against the Atlanta & West Point Railroad Company. From a judgment in favor of defendant, plaintiff brings error. Affirmed in part, and reversed in part.

The plaintiff alleged in his petition that the railroad company had injured and damaged him in the sum of \$5,000 by reason of the following facts: On June 15, 1903, he purchased from the company's agent at Gabbettsville a ticket entitling him to passage over its line to Atlanta and return, and used the ticket in going to Atlanta on that date. On the following day the plaintiff boarded a passenger train of the defendant at Atlanta, en route to Gabbettsville, and surrendered to the conductor his return ticket. When the train reached Cannonville, about 2½ miles east of his destination, the conductor called out Gabbettsville; but plaintiff, looking out and seeing the train had not arrived at that station, did not get off, informing the conductor that he was mistaken as to the place—that he desired to get off at Gabbettsville, not Cannonville. The plaintiff at the same time stated to the conductor that he had left home the day before, leaving his wife in a very delicate state of health, with attendants who were to remain until this train arrived; that she was expecting him home at the time, and he was exceedingly anxious

personal injuries of the other, see foot-note appended to *Standen v. Pennsylvania R. Co.* (Pa.), 20 R. R. R. 601, 43 Am. & Eng. R. Cas., N. S., 601; *Hutcheis v. Cedar Rapids, etc., Ry. Co.* (Iowa), 19 R. R. R. 362, 42 Am. & Eng. R. Cas., N. S., 362.

†See foot-notes appended to *Waller v. Wilmington City Ry. Co.* (Del. Sup'r Ct.), 21 R. R. R. 727, 44 Am. & Eng. R. Cas., N. S., 727.

‡For the authorities in this series on the subject of the damages recoverable against a carrier of passengers for refusal or failure to transport a passenger, or delay in transporting him, see foot-notes appended to *Milhouse v. Southern Ry.* (S. Car.), 21 R. R. R. 734, 44 Am. & Eng. R. Cas., N. S., 734; *Missouri, etc., Ry. Co. v. Smith* (Ind. Terr. App.), 21 R. R. R. 688, 44 Am. & Eng. R. Cas., N. S., 688; foot-notes appended to *Tennessee Cent. R. Co. v. Brasher's Guardian* (Ky.), 21 R. R. R. 419, 44 Am. & Eng. R. Cas., N. S., 419; foot-notes appended to *Georgia Ry. & Electric Co. v. McAllister* (Ga.), 21 R. R. R. 203, 44 Am. & Eng. R. Cas., N. S., 203.

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that the conductor should stop the train and allow him to get off at Gabbettsville; that, 'should he fail to get off when the train reached that point and to go to his home, it might have a very serious effect on his wife. The conductor promised to stop the train at Gabbettsville and allow him to get off; but, instead of doing so, the conductor went through without a stop and carried plaintiff to West Point, Ga. In consequence, the plaintiff experienced the most intense mental pain and suffering, his feelings were hurt beyond measure, and he continued to suffer such mental anguish until he reached home, some time thereafter, because of the delicate condition of his wife and his fear and apprehension of the result of his failing to arrive at home according to his promise to her. When plaintiff reached West Point, the agents of the company gave him free transportation back to Gabbettsville on the next train, which left West Point soon after the arrival of the train that he went down on; but, when this other train reached Gabbettsville, it did not stop at the station, notwithstanding the hour was late and the night was dark and the country rough, and plaintiff was negligently carried several hundred yards beyond the station, where the train was slackened and he was forced to alight, thereby putting him to considerable trouble and inconvenience, as well as mental worry. When plaintiff finally reached home, his wife had fainted and was suffering the most intense agony, all produced on account of his failure to keep his engagement, which was occasioned by the negligence and breach of duty on the part of the company. Seeing his wife in this condition increased his mental worry, anxiety, and pain; her health was seriously impaired on account of the shock; and he has been put to a large expense for medicines and medical treatment on account thereof. She has been in bed constantly since that time, unable to get up, though she was previously able to stay up and attend to her household duties; and, she being unable to do so, he has been put to the extra expense of devoting his own time to her cares and needs, thereby neglecting his business. The injury to his wife's health bids fair to be permanent; she has been constantly threatened with an abortion since receiving said shock, which tends to aggravate the mental sufferings of plaintiff; and her services and companionship are of the value of \$50 a month. The defendant company, as a public carrier, owed him the duty of stopping and allowing him to get off at his proper destination, the point to which he had paid for his passage, and was negligent in failing to do so. The act of the conductor in failing to stop, after being acquainted with the circumstances connected with the plaintiff's return to his home, was "not only gross negligence, but was inhuman and brutal in the extreme. Wherefore petitioner has been damaged and injured in the sum aforesaid." The defendant demurred to the petition on the general ground that it did not set forth any cause of action, and also upon the special ground that the dam-

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ages claimed were too remote, and could not have been in the contemplation of the parties to the alleged contract for transportation at the time the contract was made. The court sustained the demurrer and dismissed the case.

S. Holderness and F. M. Longley, for plaintiff in error.

Dorsey, Brewster & Howell and A. H. Thompson, for defendant in error.

EVANS, J. (after stating the facts). The action sounds in tort, and is for the breach of a public duty in failing to stop the train at the station to which the passenger had a ticket, in order to give him an opportunity to alight. When the railroad company sold the passenger a ticket to Atlanta and return, and the return coupon of the ticket was accepted by the conductor on the return trip, the company was under a duty to stop its train at the place of the passenger's destination and afford him an opportunity to disembark. *Pickens v. Georgia R. Co.*, 126 Ga. —, 55 S. E. 171. The recital of the facts upon which the plaintiff bases his claim for damages only makes a case of negligent omission, notwithstanding the pleader characterizes the failure of the conductor to stop the train, after being notified of the circumstances connected with plaintiff's return to his home, as "not only gross negligence," but as being "inhuman and brutal in the extreme."

The damages claimed because of the loss of the services and companionship of the plaintiff's wife and because of the expense incurred in giving her medical attention cannot properly be considered as the legal and natural consequence of the alleged tortious acts, as they depend upon other and contingent circumstances which were too remote to be the basis of any recovery. *Central R. Co. v. Dorsey*, 116 Ga. 719, 42 S. E. 1024. Nor was the plaintiff entitled to recover on the ground of wounded feelings, where one has sustained no injury to his person or his purse, by receiving bodily hurt or being subjected to insult, abuse, or humiliation. He cannot recover for mental anguish or wounded feelings arising solely from the circumstance that he is negligently carried beyond his destination, although the agents of the railway company were informed of the urgency of his being allowed to there alight. *Chapman v. W. U. Tel. Co.*, 88 Ga. 763, 15 S. E. 901, 17 L. R. A. 430, 30 Am. St. Rep. 183; *Cole v. Railroad Co.*, 102 Ga. 478, 31 S. E. 107; *State Mutual Life Ass'n v. Baldwin*, 116 Ga. 860, 43 S. E. 262.

The court below properly ruled that the plaintiff was not entitled to recover any of the items of special damages alleged, but should not have dismissed the action on general demurrer, because under the allegations the plaintiff was entitled to recover nominal damages. Where a plaintiff sets forth his cause of action and claims general damages, including in his estimate a claim for vindictive or other damages not recoverable under

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the facts stated, his petition should not be dismissed on general demurrer simply because he claims more than he is entitled to receive, but he should be allowed to proceed for nominal damages. *Cowdery v. Greenlee*, 126 Ga. —, 55 S. E. 918. The judgment sustaining the special demurrer is affirmed, but the order dismissing the suit must be set aside.

Judgment in part affirmed, and in part reversed. All the Justices concur.

STATE v. BALTIMORE & O. R. Co.

(Supreme Court of Appeals of West Virginia, Feb. 19, 1907.)

[56 S. E. Rep. 518.]

Railroads—Stations—Accommodations for Passengers.—Chapter 69, p. 179, of the Acts of 1891 section 71a of chapter 54 of the Code of 1899 [section 2382, Code of 1906], requiring railway companies and persons operating railroads to provide and keep, among other things, for the accommodation of travelers, suitable water-closets "at all stations," does not contemplate the maintenance and keeping of such retiring places at what are commonly known as "flag stations," mere open platforms in connection with which no station buildings, offices, or agents are kept.

Statutes—Construction.—A statute is to be interpreted in the light of the nature of its subject-matter, the purpose of the Legislature in passing it, and the conditions and circumstances under which the law-making body must have known it would operate; and, upon these considerations, it will not be so interpreted as to make it impose unreasonable burdens, greatly disproportionate to the resultant public benefit, unless its terms are so explicit and positive as to preclude any other construction.

(Syllabus by the Court.)

Error to Circuit Court, Barbour County.

The Baltimore & Ohio Railroad Company was convicted of violation of a statutory provision, and brings error. Reversed and remanded.

Fred. O. Blue, for plaintiff in error.

C. W. May, Atty. Gen., for the State.

POFFENBARGER, J. The Baltimore & Ohio Railroad Company complains of a judgment convicting it under an indictment charging violation of section 1, c. 69, p. 179, of the Acts of 1891, constituting section 2382 of the Code of 1906, by failure to maintain a water-closet at its alleged station in Barbour county called "Cove Run," and imposing a fine of \$10. At the so-called station the railway company has a water tank and a small platform for the accommodation of passengers and the reception and discharge of freight, but sells no tickets, keeps no office, and rarely collects any freight charges there; freight on all shipments to and from that point being prepaid. There are three dwelling houses close to the platform, of which one is owned by the daughter of Geo. W. Johnson, another by the

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wife of said Johnson, and the third by some one whose name is not disclosed. The house owned by Johnson's daughter is used for dwelling and mercantile purposes. Johnson lives in it, with his family, and his wife has a grocery store in a portion of it. In the room used for the grocery the daughter keeps the post office, and persons waiting for trains are allowed to use that room, in return for which accommodation the railroad company furnishes coal to maintain the fire. The house owned by Johnson's wife is vacant, and the third house is occupied by one Murphy. There is no other house nearer than half a mile. The station is what is known as a "flag station," and the question presented is whether it is a station within the meaning of said statute, requiring all railroad companies to provide and keep for the accommodation of travelers suitable water-closets "at all stations."

Obviously the words "all stations" literally include flag stations; but the words used by the Legislature must be interpreted in the light of the nature of the subject-matter of the statute and the conditions and circumstances suggested, respectively, by the term "station," on the one hand, and the words "flag station," on the other. It is a matter of knowledge and information common to legislators, judges, and all other persons that, as a general rule, there is no necessity for the maintenance of retiring places at ordinary flag stations. Such stations are used, for the most part, by only a few people, residing in the immediate vicinity, all well known to one another, and among whom neighborhood courtesy and hospitality prevail. Besides, at nearly all such stations convenient places of retirement can be found. This is not true of stations in villages, towns, and cities. There the maintenance of retiring places is almost an absolute necessity. The means of privacy afforded by the nature of the ground, timber, and structures are no longer available. Every spot, nook, and corner is under the observation of the occupants of some building. Such great differences in conditions and circumstances are never ignored in legislation, and courts cannot refuse to take notice of them when called upon to say what a statute means. The spirit and reason of the law must be considered, as well as its letter. We cannot bring ourselves to the conclusion that the Legislature intended to compel railroad companies to maintain water-closets at flag stations. Many of them are really provided for the accommodation of single families, or small groups of families in the several neighborhoods. Who would take care of them? Are the railroads to keep persons stationed at these places for the sole purpose of attending to such buildings? Are the section men to be ever at hand to see that they are in suitable condition on the arrival of trains? At regular stations the agent is always on the ground, and there the burden of caring for these retiring places amounts to nothing. At flag stations it would be onerous.

In thus considering the nature of the subject-matter of the

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statute and the facts which must have been within the knowledge of the Legislature, and adopting a construction which will make the statute operate reasonably and justly, we are sustained by the great weight of authority. "The character of the accommodations required varies, of course, with the amount of business done at a particular point, for accommodations of the same character cannot be expected in cities and at way stations; and this rule has been recognized even in jurisdictions where statutes exist upon the subject. In the case of flag stations and mere road crossings, at which trains stop only on signal and for the convenience of persons wishing to take the train, railway companies may be relieved altogether of the obligation to furnish depots or platforms." Hutch. on Carriers, § 929. A case perhaps more directly in point here than any other is that of *State v. Railroad Co.*, 76 Minn. 469, 79 N. W. 510. A statute required all railroad companies to provide, at "all villages and boroughs" on their respective roads, depots with suitable waiting rooms for the protection and accommodation of passengers. The railroad and warehouse commissioners applied for a mandamus to compel the railroad company to build and maintain a station house at a small unincorporated village. Notwithstanding the use in the statute of the terms "all villages and boroughs," the court refused the writ, saying: "If the word 'village,' in this act, is to be given its general popular meaning, as contended for by counsel for the relators, it would be the absolute duty of a railroad company to provide and maintain such a station at every little hamlet along its line, without regard to its size or the amount of its business, and without regard to its proximity to other stations, or to the necessities or convenience of the public. It is not to be lightly assumed that the Legislature intended to impose any such onerous and unreasonable duties upon railroad companies." The word "villages" was construed to mean incorporated villages.

The defendant undertook to prove, by a witness and by the introduction of a copy of its time-table, that the station in question is a mere flag station. To the introduction of this evidence an objection, interposed by the state, was sustained. This is assigned as error, and, from what has been said, it is apparent that the exception was well taken. The evidence should have been admitted.

For the reasons stated, the judgment will be reversed, the verdict set aside, and the case remanded for a new trial.

COTTRELL *v.* PAWTUCKET ST. RY. CO.

(Supreme Court of Rhode Island, May 23, 1906.)

[65 Atl. Rep. 269.]

Carriers—Injury to Passengers—Contributory Negligence—Standing in Car.*—Plaintiff's intestate, while a passenger on defendant's car, rose from her seat to attract the attention of the conductor. The car was in rapid motion and swaying violently. She stood facing the rear of the car with one hand on the back of the seat, until she was thrown to the ground when the motion of the car was checked by the brakes. She knew that the track was uneven, and that the car for that reason was liable to sway. Held, that she was not in the exercise of due care, and that a verdict for defendant was properly directed.

Action by William B. Cottrell, administrator, against the Pawtucket Street Railway Company. Verdict was directed for defendant, and petition for a new trial was filed by plaintiff. Denied.

Argued before DOUGLAS, C. J., and DuBois, Blodgett, and Parkhurst, JJ.

W. Waldo Robinson, for plaintiff.

Henry W. Hayes, Frank T. Easton, Lefferts S. Hoffman, and *Alonzo R. Williams*, for defendant.

DOUGLAS, C. J. The plaintiff's intestate at the time of the accident was a passenger on a small open car of the defendant, and occupied an end seat. The evidence shows that she rose from her seat to attract the attention of the conductor while the car was in rapid motion and swaying and rocking violently, as it had been for some time, and stood near the side of the car, facing the rear, until she was thrown to the ground when the motion was checked by the application of the brakes. She had one hand on the back of the seat on which she had been sitting, while the other hand hung by her side. She had traveled over this portion of the road before on the same day, and previously, and knew the condition of the track to be uneven, so as to cause the car to jolt and sway. Upon this undisputed evidence the plaintiff's intestate was not in the exercise of due care, and we think the verdict for the defendant was properly directed.

The plaintiff's petition for a new trial is denied, and the cause is remitted to the superior court for judgment upon the verdict.

*For the authorities in this series on the question whether it is contributory negligence on the part of a passenger to stand in a moving car, see foot-notes appended to *Davis v. Camden, etc., Ry. Co.* (N. J.), 20 R. R. R. 665, 43 Am. & Eng. R. Cas., N. S., 665; *St. Louis, etc., Ry. Co. v. Billingsley* (Ark.), 21 R. R. R. 469, 44 Am. & Eng. R. Cas., N. S., 469.

SPURLOCK *et u.r. v.* SHREVEPORT TRACTION CO.

(Supreme Court of Louisiana, Nov. 26, 1906. Rehearing Denied Jan. 7, 1907.)

[42 So. Rep. 575.]

Carriers—Injury to Passenger—Burden of Proof.*—The burden of proof is on the carrier to show why the contract of safe carriage was not fulfilled. Thus, where a passenger fell from the platform of a street car and was killed, in consequence of the gate not being securely fastened, the question being as to whether the gate had been insecurely latched or was unlatched by the passenger himself, the burden of proof lies on the car company.

Evidence—Demonstrative Evidence.†—When a question arises as to the working of a mechanical device, for instance, as to whether it was possible for a certain link to stay insecurely on a certain knob, the safer plan is to produce the device itself in court and demonstrate its operation.

(Syllabus by the Court.)

Appeal from First Judicial District Court, Parish of Caddo; Thomas Fletcher Bell, Judge.

Action by William H. Spurlock and wife against the Shreveport Traction Company. Judgment for plaintiffs. Defendant appeals. Affirmed.

Wise, Randolph & Rendall, for appellant.

Thomas & Herold and *Alfred Dillingham Land, Jr.*, for appellees.

PROVOSTY, J. When the cars of the defendant company enter upon Texas street, which is a double-track street, the gates of the platforms are closed on the side of the other track, as a precautionary measure to prevent egress or ingress on that side. On the 25th of November, 1904, after dark, between 6 and 6:30

*For the authorities in this series on the question whether a presumption of negligence arises from the fact that a passenger is injured, see foot-notes appended to *Chicago Union Traction Co. v. Mee* (Ill.), 21 R. R. R. 715, 44 Am. & Eng. R. Cas., N. S., 715; foot-notes appended to *Gilmore v. Milford, etc., Ry. Co.* (Mass.), 21 R. R. R. 142, 44 Am. & Eng. R. Cas., N. S., 142; foot-notes appended to *Colorado Springs, etc., Ry. Co. v. Petit* (Colo.), 21 R. R. R. 132, 44 Am. & Eng. R. Cas., N. S., 132; foot-notes appended to *Tilden v. Rhode Island Co.* (R. I.), 20 R. R. R. 809, 43 Am. & Eng. R. Cas., N. S., 809; *Illinois Cent. R. Co. v. Porter* (Tenn.), 20 R. R. R. 686, 43 Am. & Eng. R. Cas., N. S., 686; foot-notes appended to *Abel v. Northampton Traction Co.* (Pa.), 20 R. R. R. 80, 43 Am. & Eng. R. Cas., N. S., 80; *Joyce v. Los Angeles Ry. Co.* (Cal.), 20 R. R. R. 66, 43 Am. & Eng. R. Cas., N. S., 66; *Elgin, etc., Traction Co. v. Wilson* (Ill.), 20 R. R. R. 37, 43 Am. & Eng. R. Cas., N. S., 37.

†For the authorities in this series on the question of the admissibility of experimental evidence in negligence cases, see foot-notes appended to *Chicago & E. I. R. Co. v. Crose* (Ill.), 20 R. R. R. 512, 43 Am. & Eng. R. Cas., N. S., 512; *Warren v. City Electric Ry. Co.* (Mich.), 19 R. R. R. 164, 42 Am. & Eng. R. Cas., N. S., 164; *O'Dea v. Michigan Cent. R. Co.* (Mich.), 19 R. R. R. 53, 42 Am. & Eng. R. Cas., N. S., 53; *Stokes' Adm'x v. Southern Ry. Co.* (Va.), 18 R. R. R. 731, 41 Am. & Eng. R. Cas., N. S., 731.

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p. m., one of the cars of the defendant company, with another car or trailer behind it, entered upon Texas street at Spring street, two blocks below the corner where stands the Opera House. The conductor says that on thus entering Texas street he closed the gate and fastened it. The two cars stopped in front of the Opera House. This is one of the most brilliantly illuminated spots in the city of Shreveport. Several persons boarded the cars, among them the 13 year old son of the plaintiffs and his elder brother; the latter carrying a basket. The younger boy did not go into the car, but remained on the platform—the rear platform of the front, or motor, car. The elder went into the car, deposited his basket, and came out again and joined his brother on the platform. The cars started, and the younger boy leaned or staggered against the gate, and, the gate yielding, he fell out backwards, catching in his fall and holding on with one hand to the handhold, which is on the rod that stands at the end of the dashboard and supports the roof of the rear platform. The movement of the car swung him around towards the trailer. He tried in vain to better his hold by catching also with the other hand. He was dragged a distance of 15 or 20 feet while he held on, and finally let go and passed under the trailer car. His fall caused a commotion among the passengers, on noticing which the conductor rang for an emergency stop, and the cars were stopped as suddenly as could be done. They had traveled about 80 feet. The trailer car had run over the boy, and so crushed him that, for all that could be known, he was dead when picked up. The gates of the cars are of iron lattice work. When not in use they are collapsed against the body of the car. For closing, they are drawn out, or stretched, towards the dashboard of the platform, and there fastened by means of a link thrown over a knob. Besides the lateral motion by which they are stretched out or drawn in, they open by swinging outwardly, like an ordinary gate.

The parents of the boy bring this suit in damages, both as heirs of their child and in their own right. The sole question in the case is whether the gate was insecurely fastened, or was unfastened by the lad himself.

Throughout the case the defendant carries the burden of proof, for the boy was a passenger on the car, and, as was said by this court in the case of *Le Blanc v. Sweet*, 107 La. Ann. 355, 31 South. 766, 90 Am. St. Rep. 303:

“There is a broad difference between the obligation of a carrier to a passenger, and his obligation to a third person, complaining of a tort; the burden of proof in the latter case, save where otherwise provided by statute, resting upon the complainant to establish both the injury and the negligence which caused it. Whereas, it is sufficient for the passenger, suing on a contract for safe carriage, to establish the contract and show that he has not been safely set down at his destination, to throw the

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burden of explanation on the carrier. It is for the carrier, and not the passenger, to prove what negligence, and whose, prevented the fulfillment of the contractual obligation of the carrier."

We do not think defendant has discharged this burden. Of those who profess to have seen the boy at the moment of the accident, three testify for plaintiff and two for defendant. We say five, because we eliminate the brother of the boy, who, by his statement that the gate stood open—a point on which the most charitably inclined could not admit that he might be merely mistaken—has thrown doubt upon his whole testimony. The three witnesses for plaintiff are at variance with each other in some minor particulars, but they agree upon the crucial point that the boy did not have his hands, or either of them, on the gate. If they are to be believed, the boy fell because the gate, while appearing to be securely closed, was not so in reality, which would make defendant responsible. If, on the other hand, defendant's two witnesses are to be believed, one of whom says that the boy was playing with the gate, opening and shutting it, while the other has it that the boy was "monkeying" with the gate, then the boy himself caused the accident, and defendant is not responsible.

No suspicion can attach to plaintiff's three witnesses. There can be no doubt that they testified to what they thought they had seen, whether they had, in point of fact, actually seen or not what they testified to. Whereas even from the cold record, it is not so certain that defendant's two witnesses are entirely free from suspicion. The witness Nicholson, though an old resident of Shreveport and a former assistant superintendent of the defendant company, cannot name a single person whom he saw or who saw him on that occasion, except one man, who has since died; and he accounts strangely for his whereabouts immediately after the accident by saying that he got off of the car and into the buggy of this same man, now dead, and drove off. Although he says that he warned the boy against playing with the gate, and that, when the boy paid no attention to him, he touched him on the shoulder and remonstrated with him, and that the boy gave him the answer, "Oh! Go on!" he cannot remember such striking features of the boy's appearance as whether he was or not in short pants, whether he was dark or fair, had blond or black hair, or how he was dressed, or whether he had a basket in his hand. The witness Wells is a youth of 19, without occupation, except as usher at the Opera House, and the superintendent of the defendant company was seen, on the day before he testified, giving him a paper which, on cross-examination, turned out to be a copy of a statement said by the witness to have been made by him to the said superintendent and by the latter reduced to writing. This statement the witness appears to have memorized, and it contains the word "terminal," whose meaning he does not understand.

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It is also not a little strange that these two persons, who would now know better or more than any one else, did not figure as witnesses on the list which, doubtless, as is the invariable custom on such occasions, the agents of the railway company made of the possible witnesses of the occurrence; also that they were not known to be witnesses when, a few minutes after the occurrence, the sheriff made an investigation to ascertain whether there was any criminal responsibility; and, finally, that they did not figure as witnesses at the coroner's inquest. Their explanation of their reticence immediately after the occurrence, when it was in human nature to have spoken, it not very satisfactory. The witness Wells, for instance, bethought him at once that there would be a suit in damages, and kept silent for fear he might be called as a witness.

Defendant sought to prove by testimony that it was not possible for the link to stay upon the knob half way or insecurely. If such was the case, defendant should have put the matter beyond question or doubt by producing in court, as is often done in such cases, the contrivance itself, and demonstrated its working, though, by what we here say, we do not mean to intimate that, had this been done, the case would necessarily have gone differently.

The jury saw and heard the witnesses, and were better judges than we can be of their credibility. We see no reason for overthrowing their verdict. The amount allowed, \$7,500, is not excessive.

Judgment affirmed.

SANDERSON *v.* BOSTON ELEVATED RY. CO.
ATCHISON *v.* SAME.

(Supreme Judicial Court of Massachusetts, Suffolk, Feb. 28, 1907.)

[80 N. E. Rep. 515.]

Carriers—Injuries to Passenger—Contributory Negligence.*—A street car passenger was knocked from the running board of a car by the sudden starting of the car after it had slowed down. He was accustomed to ride on the cars, and knew that the car would not stop until it reached a particular point. After the car had slowed down he reached for a package, and as he clasped it there was a plunge forward of the car. There was no defect in the car or tracks, and there was no evidence of incompetency of the servants. Held, insufficient as a matter of law to show negligence on the part of the company.

Same.—A street car passenger was, without negligence on the part of the company, knocked from the running board where he was standing, and a fellow passenger in a collision with him was knocked off and injured. Held, that the fellow passenger could not recover from the company for the injuries received.

*For the authorities in this series on the subject of the duties and liabilities of carriers of passengers with respect to the jolting of cars or trains, see foot-notes appended to *Van Horn v. St. Louis Transit Co.* (Mo.), 21 R. R. R. 160, 44 Am. & Eng. R. Cas., N. S., 160; foot-notes appended to *Southern Ry. Co. v. Johnson* (Ala.), 20 R. R. R. 58, 43 Am. & Eng. R. Cas., N. S., 58.

Sanderson v. Boston Elev. Ry. Co

Exceptions from Superior Court, Suffolk County; Loranus E. Hitchcock, Judge.

Separate actions by Howard Sanderson and by Charles W. Atchison against the Boston Elevated Railway Company. There were verdicts for defendant in each action, and plaintiff in each action brings exceptions. Exceptions overruled.

Coakley, Coakley & Sherman and *C. C. Johnson*, for plaintiffs.
Choate, Hall & Stewart, for defendant.

HAMMOND, J. These actions of tort for personal injuries were tried together. The respective plaintiffs were passengers upon one of the defendant's open cars, which was proceeding northerly on the inbound track on Dorchester avenue towards Boston; and the injuries were received when this car, between First and Second streets, met a box car also belonging to the defendant, going in an opposite direction on the outward bound track. At the time the cars were passing each other Sanderson was knocked from the left hand running board of the open car, and Atchison, who was also standing upon the same board, was knocked off by collision with Sanderson as the latter fell.

Sanderson testified in substance that his destination was a coal office just north of First street; that he was familiar with that line of cars; that he knew that the cars stopped only at white posts, and that there was no white post directly opposite the office; that he intended to alight from the car at the white post just north of First street; that as the car passed Second street the conductor called out First street as the next stop; that thereupon he signaled the conductor to stop, and that just before the car came to First street it "slowed down."

He testified that he had with him a package consisting of a ledger and papers, and some writing material, which during the ride he had placed between his back and the seat. He was seated at the extreme left end of the second seat from the rear of the car. The car was crowded, passengers being upon the rear platform and on each of the running boards. As to the manner of the accident he testified as follows: "As soon as I saw that the car was coming to a stop, I reached for the seat ahead and got on my feet, and I put my left foot out on to the running board; as I did I took hold of the handle that runs from the seat, the stanchion, that runs up, and I noticed in particular that just in front of the fender of the car about a foot or a foot and a half or two feet was a car coming out on the left [outward] track coming out from the city. Just at the time I noticed that, I noticed a gentleman get off at the extreme front of the car, he cleared the car and apparently went away to the sidewalk. At that time I reached for my package which was on the seat. I had just practically about got it in my clasp, in my right hand, when immediately there was a plunge forward of the car. It seemed as though the electricity of the motor or the power had been applied. * * * It [the plunge]

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forced me backwards, * * * and I lost my grasp with my left hand. I fell backwards, and since then I found out into somebody, at the time I didn't know what I struck, I struck something backwards and I sort of rebounded and I tried to recover on my feet again, and tried to regain my first hold, and in so doing I plunged to the left into the street. * * * I was knocked unconscious." Upon cross-examination he testified that nobody jostled against him, and he described in greater detail his movements. He further said that the car was moving slowly but had not stopped, nor had it reached the stopping place; and that he did not think it would stop until it reached there; that the conductor was upon the rear platform; that he [the witness] was the only one so far as he knew who was disturbed by the "plunge" of the car; and that although he was familiar with the accelerated motion caused by the sudden application of electricity, he "never experienced before any such jump as the one that occurred when I lost my grip."

The plaintiff Atchison testified that when he boarded the car he stood at first upon the right hand running board, but as the car proceeded and the passengers changed, he gradually worked around over the rear platform to the left hand running board, near the rear seat, where at the time of the accident he was standing; that he did not know Sanderson, and that the first he noticed was when the latter "shot up" his hand; that after the hand shot up the car "slowed down." He then continued: "After his [Sanderson's] hand shot up I noticed he had a paper' he folded and pushed a paper in his pocket and was about to rise, kind of got hold of the back of the seat in front of him and stood up. With that there was a man— * * * I saw a man that was standing in front of him or in front of me on the step move up in order to let Sanderson get out, and as he stood up and got hold of that handle and rose up on that he looked out and he got hold of the [stanchion]; * * * got down there with two feet and looked up. * * * [He] got up and stood on the running board. He reached around and lifted up a ledger and had it in his hand and just then the car gave a jump and shook me a bit, and the first thing I knew somebody was thrown back into me, that was Mr. Sanderson that had got up out of his seat. [This coming back] pushed me up tight against the rod that was back of me, the stanchion rod. * * * It knocked my hat off. * * * " In answer to the question "What happened after that?" the witness answered "I noticed him kind of struggling to get hold of something. * * * I don't know what struck me, but I [saw] the car coming towards me, and I put up my hand like that. * * * He tried to get his feet and he bounced forward like this, the other car catching him and throws him right back into me and his head caught my nose right here and up against the stanchion rod I went again [and] I fell right off the car. * * * " The witness testified that this was the second time he was struck.

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One of the witnesses for the plaintiff described the movement of the car as a "kind of a lurch," another as a "jar ahead to a considerable extent," "a movement such as you feel when the power is applied." Another, when asked how severe the forward motion of the car was, answered: "Well, I couldn't state how severe it was, simply that I bumped into the man behind me, and he came back onto me. * * * He came back good." There was quite a number of people upon each of the running boards, especially that upon the right; but while some testified that they were thrown back a little, it did not appear that the movement was so great as to shake any of them off.

It is to be noted that the theory of the defense to the way in which Sanderson was thrown from the car was entirely different, and there was evidence that there was no jerk of the car; but since the evidence was conflicting we are to treat the case upon the supposition that the jury might have believed the evidence of the respective plaintiffs.

Even if the plaintiff's theory of the accident be adopted, the evidence discloses no negligence of the defendant. There does not appear to have been any evidence of defect in the car or tracks, or of incompetency of the defendant's servants. The car was moving slowly. The plaintiffs were not hurt by any movement of the car at the time and place when and where the defendant was ready to discharge passengers. Sanderson knew that the alighting place was not reached, and that the car would not stop until it reached there. He was accustomed to ride upon the electric cars and was familiar with their operation. There may be movements of a car so severe that a mere description of them and their results may justify the inference that they were attributable to some negligence on the part of the carrier, but the movement described in this case is not of that character. It was not due to any defect, and the possibility of such a movement is a thing which every one who gets upon a street car must be taken to contemplate. See *McCauley v. Springfield Street Railway*, 169 Mass. 301, 47 N. E. 1006. The case must stand with cases like *Byron v. Lynn & Boston Railroad*, 177 Mass. 303, 58 N. E. 1015, and *Timms v. Old Colony Street Ry.*, 183 Mass. 193, 66 N. E. 797.

Atchison's case must fall with Sanderson's.

Exceptions in each case overruled.

ALABAMA & VICKSBURG RAILWAY COMPANY and Robert H. Thompson and Thomas A. McWillie, Its Sureties, Plffs. in Err., v. RAILROAD COMMISSION OF THE STATE OF MISSISSIPPI.

(Argued November 13, 14, 1906. Decided December 17, 1906.)

[27 Sup. Ct. Rep. 163.]

Carriers—State Regulation of Railway Rates.—The state of Mississippi may, so far as the Federal Constitution is concerned, establish a flat rate of $3\frac{1}{2}$ cents per 100 pounds on grain and grain products carried from Vicksburg to Meridian over the road of the Alabama & Vicksburg Railway Company, where that company, under the guise of a "rebilling rate," gives any Vicksburg merchant receiving a car load of grain or grain products over the Vicksburg, Shreveport, & Pacific Railroad a rate of $3\frac{1}{2}$ cents per 100 pounds on any grain he may ship to Meridian.

In Error to the Supreme Court of the State of Mississippi to review a decree which affirmed a decree of the Chancellor of the Fifth Chancery District of that state, dismissing a bill to restrain the enforcement of an order of the state railroad commission establishing a rate on grain and grain products. Affirmed.

See same case below, 86 Miss. 667, 38 So. 356.

Statement by MR. JUSTICE BREWER:

On November 16, 1903, the railroad commission of Mississippi, by written order, directed the Alabama & Vicksburg Railway Company, hereinafter called the Vicksburg company, to put into effect, over its line of road from Vicksburg to Meridian, a flat rate of $3\frac{1}{2}$ cents per 100 pounds on grain and grain products. December 3, 1903, an application was made by the railway company to the chancellor of the fifth chancery district of the state to restrain the enforcement of this order. July 11, 1904, a temporary injunction issued on the filing of the bill was dissolved and the bill dismissed. On appeal to the supreme court of the state this decree of the chancellor was affirmed (86 Miss. 667, 38 So. 356), and thereupon this writ of error was sued out.

Messrs. *Harry H. Hall* and *McWillie & Thompson* for plaintiffs in error.

Messrs. *Hannis Taylor*, *C. H. Alexander*, and *Monroe McClurg* for defendant in error.

MR. JUSTICE BREWER delivered the opinion of the court:

The facts in this case are few. The company made what it called a "rebilling rate" of $3\frac{1}{2}$ cents per 100 pounds on grain and grain products shipped from Vicksburg to Meridian, that rate, however, being applicable only in case of shipments over the Vicksburg, Shreveport, & Pacific Railroad, hereinafter called the Shreveport road. Instead of being enforced as solely a rebilling rate, the Vicksburg merchant who received a car load

Alabama, etc., Ry. Co. *v.* Railroad Commission

of grain or grain products over the Shreveport road was permitted to either forward it over the plaintiff's road to Meridian, or, at any time within ninety days, in lieu thereof, send a similar car load, no matter whence received, from Vicksburg to Meridian at the same rate. It was in consequence of this effort on the part of the plaintiff to favor shippers who brought grain to Vicksburg over the Shreveport road that the railroad commission made the order declaring that all grain products shipped from Vicksburg to Meridian should be at the same rate, $3\frac{1}{2}$ cents per 100 pounds. The order of the commission merely meant this: If a Vicksburg merchant who received a car load of grain over the Shreveport road was permitted by the railway company to ship over the Vicksburg road to Meridian any other car load at $3\frac{1}{2}$ cents per 100 pounds, every other merchant in Vicksburg should be permitted to ship at the same rate, although he had had no dealings with the Shreveport company. It is unnecessary to inquire whether the order could be sustained if it appeared that the plaintiff received only $3\frac{1}{2}$ cents as its share of a total rate on through shipments to Meridian from the Northwest by the Shreveport road; for here, under the guise of a rebilling rate, the Vicksburg merchant who dealt with this Western road was given a rate of $3\frac{1}{2}$ per cent. on any grain that he might see fit to ship to Meridian. While it may be true that a local railway's share of an interstate rate may not be a legitimate basis upon which a state railroad commission can establish and enforce a purely local rate, yet, whenever, under the guise or pretense of a rebilling rate, some merchants are given a low local rate, the commission is justified in making that rate the rate for all. It is not bound to inquire whether it furnishes adequate return to the railway company, for the state may insist upon equality, to be enforced under the same conditions against all who perform a public or quasi public service. When voluntarily the Vicksburg company established a local rate of $3\frac{1}{2}$ per cent. from Vicksburg to Meridian for those who had, within 90 days, made a shipment over the Shreveport road, it estopped itself from complaining of an order making that rate applicable to all shipments, no matter whence they arose, and in favor of all merchants, whether those transporting over the Shreveport road or not.

We are not unaware of our decision in *Texas & P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 40 L. Ed. 940, 5 Inters. Com. Rep. 405, 16 Sup. Ct. Rep. 666, in which, on review of the interstate commerce act, we held that a mere inequality of rate was not always proof of undue discrimination, but we were passing upon an act of Congress, and seeking to ascertain its intent and scope. There was no intimation that it was not within the power of Congress to prescribe an absolute equality of rate. In the present case we are not construing an act of the state of Mississippi or passing upon the powers which by it are given to the state railroad commission. Those matters

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are settled by the decision of the supreme court of the state, and the question we have to consider is the power of the state to enforce an equality of local rates as between all parties shipping for the same distance over the same road. That a state has such power cannot be doubted, and it cannot be thwarted by any action of a railroad company which does not involve an actual interstate shipment, although done with a view of promoting the business interests of the company. Even if a state may not compel a railroad company to do business at a loss, and conceding that a railroad company may insist, as against the power of the state, upon the right to establish such rates as will afford reasonable compensation for the services rendered, yet, when it voluntarily establishes local rates for some shippers, it cannot resist the power of the state to enforce the same rates for all. The state may insist upon equality as between all its citizens, and that equality cannot be defeated in respect to any local shipments by arrangements made with or to favor outside companies.

We see no error in the ruling of the Supreme Court of the State of Mississippi, and its judgment is affirmed.

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Defendant's prayer limiting plaintiff's recovery to nominal damages was properly denied, where there was proof of actual loss by reason of the detention of the cattle. *Baltimore & O. R. Co. v. Whitehill* (Md.), 176.

Evidence was admissible to show difference in market value of cattle at time the market was held, and at time of their delivery after the market, in action for delay. *Baltimore & O. R. Co. v. Whitehill* (Md.), 176.

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Knowledge of carrier that cattle were intended for sale at the market on particular day may be shown by circumstances. *Baltimore & O. R. Co. v. Whitehill* (Md.), 176.

Not essential that plaintiff prove that delay in transporting and delivering cattle resulted from some independent specific act of negligence. *Baltimore & O. R. Co. v. Whitehill* (Md.), 176.

Provision of shipping contract that notice in writing of shipper's claim for damages shall be condition precedent to recovery for any loss or injury to stock during transportation does not cover damages such as loss of market or other losses occasioned by carrier's negligent delay, and which arise after transportation has ended. *Cornelius v. Atchison, etc., Ry. Co.* (Kan.), 222.

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Duty to protect passengers against third persons. *Hillman v. Georgia R. & Banking Co. (Ga.)*, 766.

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Alighting passenger injured by reason of sudden starting of street car. *Burke v. Bay City Traction & Electric Co. (Mich.)*, 758.

Charge that if the injured passenger was guilty of negligence which contributed in the slightest degree to her injury, jury must find for defendant, was proper. *Sweet v. Birmingham Ry. & Electric Co. (Ala.)*, 468.

Degree of care required of passenger for his own protection. *Cincinnati, etc., Ry. Co. v. Giboney (Ky.)*, 803.

Evidence was sufficient to sustain finding that alighting passenger was not guilty of contributory negligence. *Kentucky & I. Bridge & R. Co. v. Buckler (Ky.)*, 806.

Instruction that carrier is not liable if the injury to passenger was due "in part" to fact that he was on the platform voluntarily, was erroneous, as, to exculpate the company from liability, passenger's negligence must have been such as to materially contribute to the injury. *Yazoo, etc., R. Co. v. Byrd (Miss.)*, 196.

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Violation of rule forbidding persons traveling on stock passes from riding elsewhere than in caboose. *Missouri, etc., Ry. Co. v. Avis (Tex.)*, 529.

Where evidence for plaintiff showed the accident to be result of negligence in starting car when passenger was alighting and defense was that plaintiff stepped from moving car, certain instruction was erroneous as involving a hypothesis having no foundation in evidence, and tending to deprive carrier of defense of contributory negligence. *Newport News, etc., Co. v. McCormick (Va.)*, 838.

Where plaintiff boarded train to assist a passenger, her jumping off after train started precluded recovery for her injuries. *Louisville & N. R. Co. v. Wilson (Ky.)*, 830.

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Assault on passenger by carrier's employee, whether exemplary damages were recoverable against carrier. *Berg v. St. Paul City Ry. Co. (Minn.)*, 515.

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Care required of carrier. *United Rys. & Elec. Co. v. Weir (Md.)*, 472.

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Care required of carrier to furnish suitable vehicles. *Kuhlen v. Boston & N. St. Ry. Co. (Mass.)*, 785.

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Care required of street car conductor to discover if any passenger wanted to get off car. *Raymond v. Portland R. Co. (Me.)*, 476.

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Charge, in action for injury to passenger, that, unless the jury believe from the evidence that defendant's servant or agent was guilty of negligence, they must find for defendant, was proper. *Sweet v. Birmingham Ry. & Electric Co. (Ala.)*, 468.

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Conductor may refuse, in accordance with carrier's rule, to change \$10 bill for passenger, and then, on his failure to otherwise pay fare, require him to leave car, though passenger had no knowledge of the rule. *Knoxville Traction Co. v. Wilkerson (Tenn.)*, 763.

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Admissibility of testimony that if three cars unloaded 33 passengers each on elevated railway platform, it would make a fair-sized crowd thereon. *Beverley v. Boston Elevated Ry. Co. (Mass.)*, 753.

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Evidence of custom of the carrier not to stop at the point on other occasions had no bearing on the issue whether or not the car started suddenly, after it had come to a full stop, at the time in question. *Greer v. Union St. Ry. Co. (Mass.)*, 240.

Evidence of custom of the carrier not to stop at the point on other occasions was not admissible, on the theory that it showed an implied invitation to plaintiff to board the car while in motion, where plaintiff did not claim that he knew of such custom or that he found the car moving when he stepped upon it. *Greer v. Union St. R. Co. (Mass.)*, 240.

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Precautions against recurrence of injuries to passengers from same cause. *Beverley v. Boston Elevated Ry. Co. (Mass.)*, 753.

Question whether or not, in determining the plan of operating a street railway, it was proper to consider the desires of the traveling public, where they can be taken into consideration without interfering with safety in operation of road, was properly excluded. *Beverley v. Boston Elevated Ry. Co. (Mass.)*, 753.

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Carrier liable on account of using unnecessary and insulting language to passenger presenting invalid ticket and refusing to pay fare. *Boling v. St. Louis & S. F. R. Co. (Mo.)*, 456.

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- Negligence to start street car while passenger is alighting at express or implied invitation of carrier. *Burke v. Bay City Traction, etc., Co.* (Mich.), 758.
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- Liability for negligence of conductor in assisting passenger to alight. *Hanlon v. Central R. Co. of New Jersey* (N. Y.), 813.
- Negligence in leaving injured passenger on ground exposed to the weather, carrier liable though passenger contributed to his being thrown from the train. *Yazoo, etc., R. Co. v. Byrd* (Miss.), 196.
- Negligence in not preventing passenger from being injured by crowd while attempting to enter car. *Kuhlen v. Boston & N. St. Ry. Co.* (Mass.), 785.
- No evidence of negligence, in action for injury sustained by plaintiff by reason of catching her heel on car step while alighting; it appearing that the car did not differ with respect to height of the step from ground, from other cars of the carrier. *Traphagen v. Erie R. Co.* (N. J.), 242.
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- Separation of white and colored passengers, carrier's duties. *Hillman v. Georgia R. & Banking Co.* (Ga.), 766.

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On question of liability of street railway for injury to children from playing about cars left unguarded in streets, the legality or illegality of the occupation of the street by the company is immaterial. *Denver City Tramway Co. v. Nicholas (Colo.)*, 523.

Turntables.

Not negligence to maintain unfastened turntable on railroad's premises, at a distance of 50 to 300 feet from public grounds. *Walker's Adm'r v. Potomac, etc., R. Co. (Va.)*, 646.

COLLISIONS.

See MASTER AND SERVANT.

COMMON CARRIERS.

See CARRIERS OF LIVE STOCK; CONNECTING CARRIERS; RAILROAD COMMISSIONS.

Damages.

Corpse of wife exposed to rain, right of husband to recover against carrier for his mental anguish. *Lindh v. Great Northern Ry. Co. (Minn.)*, 756.

COMMON CARRIERS—Continued.

Measure of damages for loss of goods. *Chesapeake & O. Ry. Co. v. Stock & Sons (Va.)*, 31.

Declaration for loss of goods in transit stated cause of action in assumpsit upon contract of carriage. *Chesapeake & O. Ry. Co. v. Stock & Sons (Va.)*, 31.

Delay.

Excessive crop as excuse for delay in transporting cotton. *Yazoo & M. V. R. Co. v. Blum (Miss.)*, 219.

Lien for freight charges, termination of. *Lembeck v. Jarvis Terminal Cold Storage Co. (N. J.)*, 245.

Limiting Liability.

Construction of bill of lading having on it the characters "Rel. Val. Lts. [or Ltd.] 5 cwt." *Norfolk & W. Ry. Co. v. Harman (Va.)*, 518.

Power of carrier to limit its liability by contract. *St. Louis & S. F. R. Co. v. Phillips (Okl.)*, 201.

Responsibility of carrier for real value of freight lost was not restricted by voucher received by shipper from carrier, unless shipper had knowledge of stipulation therein contained; and his knowledge that carrier's charges depend on value of goods is not sufficient to render such limit of liability binding. *Hayes v. Adams Express Co. (N. J.)*, 506.

Right to show falsity of recitals in contract that opportunity was given shipper to ship without carrier's liability being limited. *St. Louis & S. F. R. Co. v. Wells (Ark.)*, 774.

Sufficiency of evidence to sustain finding that shipper was denied opportunity to ship under contract not limiting liability of carrier. *St. Louis & S. F. R. Co. v. Wells (Ark.)*, 774.

Time within which claim for failure to deliver freight may be made, validity of agreement. *St. Louis & S. F. R. Co. v. Phillips (Okl.)*, 201.

Validity of stipulation limiting amount of carrier's liability dependent upon shipper's knowledge of its terms. *Hayes v. Adams Express Co. (N. J.)*, 506.

Whether time provided by shipping contract for giving notice of loss is reasonable or not is to be determined by circumstances of the case. *St. Louis & S. F. R. Co. v. Phillips (Okl.)*, 201.

Refusal to require plaintiffs to show in the bill of particulars where the goods and cars were delivered to defendant was not prejudicial error. *Chesapeake & O. Ry. Co. v. Stock & Sons (Va.)*, 31.

CONNECTING CARRIERS.

See TICKETS AND FARES.

Bill of lading guarantying through rate to destination does not establish agency or partnership relation between connecting railroads. *Chesapeake & O. Ry. Co. v. Stock & Sons (Va.)*, 31.

Liability of connecting carrier for loss not occurring on its own line. *Chesapeake & O. Ry. Co. v. Stock & Sons (Va.)*, 31.

Routing by initial carrier, validity of carriers' rule providing for. *Southern Pac. Co., etc., v. Interstate Com. Comm'n (U. S.)*, 490.

Whether carriers are forbidden by act of Congress of Feb. 4, 1887, from adopting rule under which the right of routing beyond its own terminal is reserved to the initial carrier as the condition of guaranteeing through rates to shipper. *Southern Pac. Co., etc., v. Interstate Com. Comm'n (U. S.)*, 490.

CONSTITUTIONAL LAW.

See BRIDGES; CORPORATIONS; DAMAGES; EMINENT DOMAIN; EMPLOYERS' LIABILITY ACTS; FEDERAL.

CONSTITUTIONAL LAW—Continued.

JURISDICTION; RAILROAD COMMISSIONS; STREET RAILWAYS; TICKETS AND FARES.

Conclusiveness of decision of United States Supreme Court holding state statute regulating railroads unconstitutional. *Commonwealth v. Atlantic Coast Line R. Co. (Va.)*, 1.

Power of state of Mississippi, under Federal Constitution, to establish certain flat rate on grain carried from Vicksburg to Meridian on certain railroad, where the railroad, under the guise of "rebilling," gives any Vicksburg merchant receiving a car load of grain over certain railroad a rate of 3½ cents per 100 pounds on any grain he may ship to Meridian. *Alabama, etc., Ry. Co. v. Railroad Commission (U. S.)*, 861.

CONTRIBUTORY NEGLIGENCE.

See CARRIERS; CHILDREN; CROSSINGS; DEATH BY WRONGFUL ACT; FIRES SET BY LOCOMOTIVES; IMPUTED NEGLIGENCE; LICENSEES; MASTER AND SERVANT; STREET RAILWAYS; TRESPASSERS.

Care that employee must exercise for his own safety, in order to be entitled to recover against third person for injury sustained in attempting to save his master's property from destruction in burning building. *Pegram v. Seaboard Air Line Ry. (N. Car.)*, 481.

Court may hold plaintiff guilty of contributory negligence when some prominent and decisive act of negligence has been committed by him, in regard to character and effect of which no room is left for ordinary minds to differ. *United Rys. & Elec. Co. v. Weir (Md.)*, 472.

Danger from fire incurred to save master's property. *Pegram v. Seaboard Air Line Ry. (N. Car.)*, 481.

Definition. *Wilson v. Southern Ry. (S. Car.)*, 548.

Duty to owner of cars wrongfully attached to secure replevin bond, in order to lessen injury. *Pittsburg, etc., Ry. Co. v. Wakefield Hardware Co. (N. Car.)*, 149.

Freedom from may be inferred from circumstances. *Elgin, etc., Ry. Co. v. Hoadley (Ill.)*, 663.

Incurring risk to save property from fire, instructions as to were conflicting. *Pegram v. Seaboard Air Line Ry. (N. Car.)*, 481.

Not error to refuse instruction, that, in determining whether deceased was guilty of contributory negligence, jury should take into account the instinct of self-preservation, where attention of jury was not in any way called to such doctrine. *McBride v. Des Moines City Ry. Co. (Iowa)*, 318.

Question for jury. *Arenschield v. Chicago, etc., Ry. Co. (Iowa)*, 41.

CORPORATION COMMISSION.

See TICKETS AND FARES.

CORPORATIONS.

Corporations are not citizens, within Const. U. S., Amend. 14. *Pittsburg, etc., Ry. Co. v. Lighthouse (Ind.)*, 130.

Corporation by general appearance admits its corporate existence. *Pittsburg, etc., Ry. Co. v. Lighthouse (Ind.)*, 130.

CORPSES.

See COMMON CARRIERS.

CROSSINGS.

See BRIDGES; FRIGHTENING TEAMS; LEASES AND RUNNING POWERS; LICENSEES; RAILROADS IN STREETS; STREET RAILWAYS.

Certain instructions as to railroad's duties and liabilities were conflicting. *Porter v. Missouri Pac. Ry. Co. (Mo.)*, 342.

CROSSINGS—Continued.

Cinders thrown from train by fireman with knowledge of plaintiff's presence, liability of railroad. *Louisville & N. R. Co. v. Eaden* (Ky.), 119.

Complaint was sufficient to withstand general demurrer, as well as motion in arrest of judgment after verdict, where it was further alleged that fireman knew plaintiff was on crossing at the time he threw out the embers and coals. *Louisville & N. R. Co. v. Eaden* (Ky.), 119.

Contributory Negligence.

Attempting to cross track, with knowledge that train was approaching, in order to protect his child. *Illinois Cent. R. Co. v. Willis' Adm'r* (Ky.), 312.

Attempting to cross track without paying any attention to approaching train, which was plainly visible and audible, merely because statutory signals were not given. *International & G. N. R. Co. v. Edwards* (Tex.), 509.

Attempting to drive over track after seeing approaching train. *Porter v. Missouri Pac. Ry. Co.* (Mo.), 342.

Certain evidence, showing train should have been seen, established contributory negligence as matter of law. *Keller v. Erie R. Co.* (N. Y.), 599.

Deceased, killed while trimming lamp between tracks, was not negligent in being so near track as to be within reach of engine which struck him. *Elgin, etc., Ry. Co. v. Hoadley* (Ill.), 663.

Driving over crossing without taking any precautions when gates are open. *Koch v. Southern California Ry. Co.* (Cal.), 615.

Effect of failure to use ordinary care when it would have enabled deceased to discover approaching train in time. *Louisville & N. R. Co. v. Lucas' Adm'r* (Ky.), 739.

Negligence in backing train without lookout on rear car was not proximate cause of death of person who stepped on track without looking or listening for trains. *Baker v. Tacoma Eastern Ry. Co.* (Wash.), 723.

Of decedent was question for jury. *Louisville & N. R. Co. v. Lucas' Adm'r* (Ky.), 739.

Person killed by train he knew was approaching before he attempted to cross track. *Hutchinson v. Missouri Pac. Ry. Co.* (Mo.), 683.

Plaintiff need not allege that he did not hear or see approaching train. *Bamberg v. Atlantic Coast Line R. Co.* (S. Car.), 20.

Presumption of due care on part of person killed by engine at night. *St. Louis, etc., R. Co. v. Chapman* (C. C. A.), 622.

Presumption that deceased exercised ordinary care. *Porter v. Missouri Pac. Ry. Co.* (Mo.), 342.

Presumption that deceased exercised ordinary care rebutted by circumstances. *Porter v. Missouri Pac. Ry. Co.* (Mo.), 342.

Right to presume that statutory signals will be given. *Elgin, etc., Ry. Co. v. Hoadley* (Ill.), 663.

Sufficiency of evidence of. *St. Louis, etc., R. Co. v. Chapman* (C. C. A.), 622.

Sufficiency of evidence to sustain burden, cast on defendant by its default, of showing that deceased was guilty of. *Norris v. New York, etc., R. Co.* (Conn.), 17.

Where person was killed while working about railroad crossing, and had been upon the crossing for some time before the accident, any negligence on his part while going upon the crossing could not relieve railroad from liability. *Elgin, etc., Ry. Co. v. Hoadley* (Ill.), 663.

Dangerous character of crossing did not entitle plaintiff to recover, in absence of proof that its condition directly caused or

CROSSINGS—Continued.

contributed to decedent's death. *Porter v. Missouri Pac. Ry. Co. (Mo.)*, 342.

Evidence.

Error in admitting evidence that railroad might have rendered crossing more safe by locating its buildings in a different position was cured by an oral admonition. *Louisville & N. R. Co. v. Lucas' Adm'r (Ky.)*, 739.

Testimony that railroad should have located certain building so as not to obstruct view of tracks was incompetent. *Louisville & N. R. Co. v. Lucas' Adm'r (Ky.)*, 739.

Gross negligence in backing train over crossing, which warranted recovery for death of plaintiff's decedent, notwithstanding contributory negligence, was not shown. *Baker v. Tacoma Eastern Ry. Co. (Wash.)*, 723.

Instruction calling attention to dangerous character of the crossing was erroneous as inapplicable to facts. *Porter v. Missouri Pac. Ry. Co. (Mo.)*, 342.

Lookouts.

Instruction was not open to objection that it authorized jury to find defendant negligent, unless it provided both a lookout in rear of the engine and a watchman at the crossing. *Arenschield v. Chicago, etc., Ry. Co. (Iowa)*, 41.

Not negligence to construct depots, etc., at point where they obstruct view of railroad from crossing. *Louisville & N. R. Co. v. Lucas' Adm'r (Ky.)*, 739.

Presumption of negligence where person is found dead beneath locomotive at grade crossing. *St. Louis, etc., R. Co. v. Chapman (C. C. A.)*, 622.

Signals.

Care required at dangerous crossing at which railroad is chargeable with notice that the statutory warnings are not sufficient. *Louisville & N. R. Co. v. Lucas' Adm'r (Ky.)*, 739.

Failure to charge that signaling statutes had no application to plaintiff because he was not injured at a traveled place is not error, where no such request was made. *Bamberg v. Atlantic Coast Line R. Co. (S. Car.)*, 20.

Failure to comply with Hurd's Rev. St. 1903, c. 114, § 68, was proximate cause of killing person engaged in trimming lamp between tracks at crossing. *Elgin, etc., Ry. Co. v. Hoadley (Ill.)*, 663.

Failure to give statutory signals was immaterial because deceased knew that train was approaching. *Hutchinson v. Missouri Pac. Ry. Co. (Mo.)*, 683.

Failure to give statutory signals was immaterial because deceased knew that train was approaching. *Illinois Cent. R. Co. v. Willis' Adm'r (Ky.)*, 312.

Negligence in failing to give signals was question for jury. *Louisville & N. R. Co. v. Lucas' Adm'r (Ky.)*, 739.

Negligence in running train over crossing at 40 miles an hour without giving crossing signals. *Norris v. New York, etc., R. Co. (Conn.)*, 17.

Railroad liable for death caused by failure to give such signals as are reasonably necessary on account of the dangerous character of the crossing. *Louisville & N. R. Co. v. Lucas' Adm'r (Ky.)*, 739.

Where a prudent railroad company would give warning of the approach of a train to a public place, it is negligence to fail to do so. *Bamberg v. Atlantic Coast Line R. Co. (S. Car.)*, 20.

Where there is evidence tending to show that signals were not given at railroad crossing by train passing over an interlocking switch, though according to the rules of the company

CROSSINGS—Continued.

it would not be opened except for such signals, the court will not hold, as matter of law, that signals were given. *Bamberg v. Atlantic Coast Line R. Co. (S. Car.)*, 20.

Speed.

Excessive speed of train was immaterial because deceased knew train was approaching and could have avoided it by the exercise of ordinary care. *Illinois Cent. R. Co. v. Willis' Adm'r (Ky.)*, 312.

Stop, Look, and Listen.

Care required at street intersections, before attempting to drive vehicle across street car tracks. *Dewez v. Orleans R. Co. (La.)*, 24.

Care required of one about to drive across railroad tracks. *Louisville & N. R. Co. v. Lucas' Adm'r (Ky.)*, 739.

Decedent was guilty of contributory negligence as matter of law, in stepping on track without looking or listening for trains, which precluded recovery. *Baker v. Tacoma Eastern Ry. Co. (Wash.)*, 723.

Degree of care required of highway traveler. *Norris v. New York, etc., R. Co. (Conn.)*, 17.

Duty of highway traveler to stop until smoke had ceased to obstruct view. *Keller v. Erie R. Co. (N. Y.)*, 599.

Failure of one about to drive across railroad crossing to stop, look, or listen was not of itself sufficient to prevent recovery for his death. *Louisville & N. R. Co. v. Lucas' Adm'r (Ky.)*, 739.

Failure of traveler to look both ways and listen for trains is not excused by negligence in failing to give proper train signals. *Porter v. Missouri Pac. Ry. Co. (Mo.)*, 342.

Look and listen rule does not apply in all strictness to railroad employees required to remain on or about the tracks. *Pittsburg, etc., Ry. Co. v. Lightheiser (Ind.)*, 130.

Presumption that deceased looked and listened for trains. *Porter v. Missouri Pac. Ry. Co. (Mo.)*, 342.

Question for jury, ordinarily, whether attempt to cross track without stopping to look and listen is negligence. *Bamberg v. Atlantic Coast Line R. Co. (S. Car.)*, 20.

Right of driver of vehicle to rely on rule requiring street cars to keep certain distance apart. *Dewez v. Orleans R. Co. (La.)*, 24.

Trainmen were entitled to presume that decedent would not attempt to cross ahead of engine, and were therefore not chargeable with negligence after discovery of decedent's peril. *Porter v. Missouri Pac. Ry. Co. (Mo.)*, 342.

CUSTOM AND USAGE.

See MASTER AND SERVANT.

DAMAGES.

See BAGGAGE; CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; COMMON CARRIERS; CONTRIBUTORY NEGLIGENCE; DEATH BY WRONGFUL ACT; EMINENT DOMAIN; PERSONAL INJURIES.

Case will not be reversed, in absence of a showing of abuse of discretion, for action of trial court in permitting plaintiff's counsel to urge question of damages for the first time in closing address. *Pittsburg, etc., Ry. Co. v. Bovard (Ill.)*, 122.

Elements.

Profits which owner of cars wrongfully attached might have made. *Pittsburg, etc., Ry. Co. v. Wakefield Hardware Co. (N. Car.)*, 149.

DAMAGES—Continued.**Excessive Verdict.**

Constitutionality of Kirby's Dig., § 6217, authorizing circuit judge, on motion for new trial in an action for recovery of damages measured by an indeterminate standard, to indicate that he deems the verdict excessive, etc. *St. Louis & N. A. R. Co. v. Mathis* (Ark.), 538.

On appeal, the court will not disturb verdict on the ground that it is excessive unless the damages are so excessive as to indicate that jury acted from prejudice, partiality, or corruption. *Malott v. Central Trust Co.* (Ind.), 189.

When verdict will not be disturbed because of excessive damages. *Pittsburg, etc., Ry. Co. v. Lightheiser* (Ind.), 130.

Exemplary Damages.

Are recoverable for injuries from gross negligence. *Louisville & N. R. Co. v. Eaden* (Ky.), 119.

In order to sustain alleged urging of damages for the first time in plaintiff's closing address, it must appear by the record that the question had not in fact been before discussed. *Pittsburg, etc., Ry. Co. v. Bovard* (Ill.), 122.

Measure.

Cars wrongfully attached. *Pittsburg, etc., Ry. Co. v. Wakefield Hardware Co.* (N. Car.), 149.

DEATH BY WRONGFUL ACT.

See CONTRIBUTORY NEGLIGENCE; CROSSINGS; STREET RAILWAYS; VENUE.

Burden of proving defendant's negligence and that it was proximate cause. *Pegram v. Seaboard Air Line Ry.* (N. Car.), 481.

Contributory Negligence.

Certain newly discovered evidence did not warrant granting of new trial; there being no evidence that deceased was intoxicated. *Arenschild v. Chicago, etc., Ry. Co.* (Iowa), 41.

Default by railroad as prima facie admission of allegation that plaintiff's intestate was in the exercise of due care. *Norris v. New York, etc., R. Co.* (Conn.), 17.

Presumption of due care on part of deceased. *Stewart v. Raleigh, etc., R. Co.* (N. Car.), 572.

Damages.

Elements of damages in action by minor children for death of parent. *St. Louis & N. A. R. Co. v. Mathis* (Ark.), 538.

Excessive verdict in action by minor children for death of father. *St. Louis & N. A. R. Co. v. Mathis* (Ark.), 538.

For death of mail carrier drawing \$50 a month, 35 years of age, verdict for \$8,000 was not excessive. *Louisville & N. R. Co. v. Lucas' Adm'r* (Ky.), 739.

Harmless error in instruction on measure of damages. *Lee v. Missouri Pac. Ry. Co.* (Mo.), 375.

Jury, in action by minor children for death of parent, must proceed on theory of compensation for pecuniary loss, and court must see that such limit is not exceeded. *St. Louis & N. A. R. Co. v. Mathis* (Ark.), 538.

Measure of. *Louisville & N. R. Co. v. Lucas' Adm'r* (Ky.), 739.

\$8,000 was excessive verdict, in action for death of brakeman, and should be reduced to \$5,000. *St. Louis, etc., Ry. Co. v. Caraway* (Ark.), 532.

\$9,500 was not excessive for death of railway mail clerk. *Malott v. Central Trust Co.* (Ind.), 189.

Parties.

Widow of resident of Kansas, killed in that state by alleged

DEATH BY WRONGFUL ACT—Continued.

negligence, may sue in Missouri for the injury; and the fact that in such suit she was unnecessarily appointed trustee for her children did not either take away or increase her right of action. *Lee v. Missouri Pac. Ry. Co. (Mo.)*, 375.

Right of Action.

Cause of action arising in foreign state, necessity of relying upon statute of such state. *Lee v. Missouri Pac. Ry. Co. (Mo.)*, 375.

Court at liberty to differ from judgment of foreign court as to application of law of foreign state to the facts. *Lee v. Missouri Pac. Ry. Co. (Mo.)*, 375.

In action for negligence causing death of citizen of Kansas, in which plaintiff relied for recovery upon certain statute of Kansas, petition, although it did not set out facts sufficient to constitute cause of action under laws of Missouri, was sufficient under Mo. Rev. St. 1899, § 629, as against objection made for first time after trial had begun. *Lee v. Missouri Pac. Ry. Co. (Mo.)*, 375.

Right of action given by Mo. Rev. St. 1899, § 2864, includes death from failure to discharge a duty imposed by statute or ordinance. *McQuade v. St. Louis & Suburban Ry. Co. (Mo.)*, 727.

DEEDS.

See RIGHT OF WAY.

DEMONSTRATIVE EVIDENCE.

See PERSONAL INJURIES.

DEPOTS.

See STATIONS AND DEPOTS.

DISCOVERED PERIL.

See CROSSINGS.

DISCRIMINATION.

See INTERSTATE COMMERCE.

ELEVATED RAILWAYS.

See CARRIERS OF PASSENGERS.

EMINENT DOMAIN.**Damages.**

Danger of fire, and increased danger to stock, where railroad right of way cuts in two a tract of land. *St. Louis, etc., Ry. Co. v. Oliver (Okla.)*, 167.

Interest upon amount found in verdict, when the court may make the computation, and add interest so found to sum found in the verdict and render judgment for the aggregate amount. *St. Louis, etc., R. Co. v. Oliver (Okla.)*, 167.

When the court may reserve question of interest on award for its own determination, and direct jury not to include interest in their verdict. *St. Louis, etc., Ry. Co. v. Oliver (Okla.)*, 167.

Public Use.

Constitutional right of lessee of certain railroad, and the owner of three fourths of its stock, to proceed, under Conn. Gen. St. §§ 3694, 3695, to condemn the out-standing shares owed by a person who refuses to agree on the terms of purchase, where it is proposed to improve the railroad. *Offield v. New York, etc., R. Co. (U. S.)*, 152.

EMPLOYERS' LIABILITY ACTS.

See MASTER AND SERVANT.

EMPLOYERS' LIABILITY ACTS—Continued.**Application of Statutes.**

Burns' Ann. St. 1901, § 7083, enlarged the class of vice principals previously existing; and under it railroads were liable for injuries to servant caused by negligence of employee in charge of any signal, etc. *Pittsburg, etc., Ry. Co. v. Lightheiser* (Ind.) 130.

Engineer was engaged in defendant's service when injured, within Burns' Ann. St. 1901, § 7083. *Pittsburg, etc., Ry. Co. v. Lightheiser* (Ind.), 130.

Ohio statute requiring railroad corporations to block their frogs is not applicable to manufacturing company maintaining in its yards a number of tracks and a switch engine for its use in shifting freight cars. *Taggart v. Republic Iron & Steel Co.* (C. C. A.), 511.

Question for jury whether sectionman's employment, in taking out an old rail and putting in another, involved an element of hazard peculiar to railroad business. *Tay v. Willmar & S. F. Ry. Co.* (Minn.), 710.

Assumption of Risk.

Defense not available in action under Burns, Ann. St. 1901, § 7083, subd. 4. *Pittsburg, etc., Ry. Co. v. Lightheiser* (Ind.), 130.

No defense to action under N. Car. Priv. Laws 1897, p. 83, § 56. *Biles v. Seaboard Air Line Ry. Co.* (N. Car.), 47.

Constitutional Law.

Constitutional prohibition of the passage of ex post facto laws does not apply to an employers' liability act. *Pittsburg, etc., Ry. Co. v. Lightheiser* (Ind.), 130.

Constitutionality of Burns' Ann. St. 1901, § 7083 et seq. *Pittsburg, etc., Ry. Co. v. Lightheiser* (Ind.), 130.

Decision that Ind. act of 1893 was not unconstitutional was the law of the case on retrial. *Pittsburg, etc., Ry. Co. v. Lightheiser* (Ind.), 130.

Indiana employers' liability act of 1893 was not unconstitutional, as applied to plaintiff's case, as impairing the obligations of his contract of employment. *Pittsburg, etc., Ry. Co. v. Lightheiser* (Ind.), 130.

Contributory Negligence.

May prevent recovery in action under N. Car. priv. Laws 1897, p. 83, c. 56. *Biles v. Seaboard Air Line Ry. Co.* (N. Car.), 47.

EVIDENCE.

See ACCIDENTS ON TRACK; CARRIERS OF LIVE STOCK; CARRIERS OF PASSENGERS; CHILDREN; CROSSINGS; FIRES SET BY LOCOMOTIVES; MASTER AND SERVANT; NEGLIGENCE; STOCK, INJURIES TO; STREET RAILWAYS.

Demonstrative evidence. *Spurlock v. Shreveport Traction Co.* (La.), 854.

Offer of settlement. *Chesapeake & O. Ry. Co. v. Stock & Sons* (Va.), 31.

EXEMPLARY DAMAGES.

See DAMAGES.

EXEMPTION FROM LIABILITY.

See MASTER AND SERVANT.

EX POST FACTO LAWS.

See EMPLOYERS' LIABILITY ACTS.

FARM CROSSINGS.

See LICENSEES.

FEDERAL JURISDICTION.

See CONSTITUTIONAL LAW; INTERSTATE COMMERCE.

Action against master and servant for willful tort by his servant is not removable to federal court on theory that servant is a sham defendant. *Able v. Southern Ry. (S. Car.)*, 115.

Action against railroad and its employees whose negligence caused accident not convertible into separable controversy for purpose of removal to federal circuit court because of diversity of citizenship between plaintiff and railroad. *Cincinnati, etc., Ry. Co. v. Bohon (U. S.)*, 434.

Action against servant of railroad and railroad jointly, for negligence of servant, was not removable to federal court for diversity of citizenship. *Lanning v. Chicago Great Western Ry. Co. (Mo.)*, 81.

Declaration, in action against railroad and engineer and conductor of train by which deceased was killed, stated a cause of action for joint tort committed by all the defendants; and the railroad, whose citizenship alone was diverse, was therefore, not entitled to remove cause to federal court. *Louisville & N. R. Co. v. Vincent (Tenn.)*, 415.

Federal question respecting validity of paving assessment against street railway company was not open, under the circumstances, reviewable on writ of error from supreme court of the United States. *Fair Haven & Westville R. Co. v. New Haven (U. S.)*, 160.

Immaterial to railroads' right to remove cause to federal court, because its citizenship was diverse, that plaintiff joined resident defendants, the engineer and conductor of train by which deceased was killed, merely for purpose of avoiding federal jurisdiction. *Louisville & N. R. Co. v. Vincent (Tenn.)*, 415.

Question whether state court, consistently with act to regulate commerce can grant relief to shipper because of the exaction by common carrier of alleged unreasonable freight rate for an interstate shipment, when such rate has been properly promulgated, is a federal question. *Texas, etc., Ry. Co. v. Abilene Cotton Oil Co. (U. S.)*, 816.

Right to have proceedings taken under Conn. Gen. St. §§ 3694, 3695, by railroad company which is the lessee of another railway, and the owner of three fourths of its stock, to condemn the outstanding shares owned by a person who refuses to agree to the terms of purchase, removed to Supreme Court of the United States. *Offield v. New York, etc., R. Co. (U. S.)*, 152.

FELLOW SERVANTS.

See EMPLOYERS' LIABILITY ACTS; MASTER AND SERVANT.

Application of fellow servant rule depends upon law of state in which railroad employee was injured. *Morrison v. San Pedro, etc., R. Co. (Utah)*, 690.

Concurring negligence of fellow servant and master rendered latter liable. *Conine v. Olympia Logging Co. (Wash.)*, 568.

Conductor of freight train, from time certain obstruction was thrown upon track until the passenger train was wrecked, was a vice principal, whose duty it was to remove the obstruction and to warn the approaching passenger train. *Cincinnati, etc., Ry. Co. v. Curd (Ky.)*, 69.

Crews of different trains. *Cincinnati, etc., Ry. Co. v. Curd (Ky.)*, 69; *Cincinnati, etc., Ry. Co. v. Hill's Adm'r (Ky.)*, 52.

Definitions of fellow servant and vice principal. *Morrison v. San Pedro, etc., R. Co. (Utah)*, 690.

FELLOW SERVANTS—Continued.**Different Department Limitation.**

Railroad's coal-dock hand and its locomotive engineer were not fellow servants. *Lanning v. Chicago Great Western Ry. Co.* (Mo.), 81.

Duty of trainmen to warn brakeman, who was killed while standing on track, was that of his master, the railroad company. *Cincinnati, etc., Ry. Co. v. Hill's Adm'r* (Ky.), 52.

Employees of different companies. *Pittsburg, etc., Ry. Co. v. Bovard* (Ill.), 122.

In running train, the conductor was a representative of the railroad. *Wilson v. Southern Ry. (S. Car.)*, 548.

Master is not liable for negligence of co-servant with respect to conduct of work. *Neagle v. Syracuse, etc., R. Co.* (N. Y.), 89.

Master not liable for negligence of fellow servant. *McGinnis v. Chicago, etc., Ry. Co.* (Mo.), 715.

Negligence of trainmaster in permitting his train to be run in violation of bulletin orders was negligence in his capacity as vice principal. *Morrison v. San Pedro, etc., R. Co.* (Utah), 690.

Question of law as to whether those by whose negligence another was killed were fellow servant of deceased is not foreclosed to defendant by submission of special interrogatory on the subject, after refusal of a peremptory instruction and a finding that they were not. *Pittsburg, etc., Ry. Co. v. Bovard* (Ill.), 122.

Superior Servant Limitation.

Liability of master for injuries to servant by negligence of another servant does not depend on grade of the negligent servant, but on the duty which he is discharging at the time. *Cincinnati, etc., Ry. Co. v. Hill's Adm'r* (Ky.), 52.

Track walker and fireman. *Neagle v. Syracuse, etc., R. Co.* (N. Y.), 89.

Train dispatcher and fireman. *Ricker v. Central R. Co.* (N. J.), 109.

FENCES.

See STOCK, INJURIES TO.

FINDINGS.

See STREET RAILWAYS.

FIRE DEPARTMENT.

See STREET RAILWAYS.

FIRES.

See CONTRIBUTORY NEGLIGENCE.

FIRES SET BY LOCOMOTIVES.

See EMINENT DOMAIN.

Appliances.

Degree of care required in furnishing spark arresters. *St. Louis, etc., Ry. Co. v. Dawson* (Ark.), 612.

Combustibles Near Track.

Not negligence per se for railroad to permit combustible material and buildings to be upon or in close proximity to its right of way. *Atchison, etc., Ry. Co. v. Sprague* (Kan.), 330.

Contributory Negligence.

Erection and use of building for ordinary purposes near railroad track. *Cincinnati, etc., Ry. Co. v. Cecil* (Ky.), 607.

Evidence.

Circumstantial evidence of origin of fire may prevent verdict

FIRES SET BY LOCOMOTIVES—Continued.

for plaintiff from being set aside. *Minard v. West Jersey & S. Ry. Co. (N. J.)*, 327.

Engineer may testify as expert as to proper manner of handling locomotive when passing combustibles. *St. Louis, etc., Ry. Co. v. Dawson (Ark.)*, 612.

It was error, because of certain testimony introduced by defendant, to refuse to permit plaintiff to place in evidence cinders of more than quarter of an inch in diameter found by him along the line of defendant's track. *Cincinnati, etc., Ry. Co. v. Cecil (Ky.)*, 607.

Negligence was question for jury. *Cincinnati, etc., Ry. Co. v. Cecil (Ky.)*, 607.

Omission of court in charging to define negligence or diligence was not erroneous, where no instruction as to such words was requested. *Cincinnati, etc., Ry. Co. v. Cecil (Ky.)*, 607.

Origin of Fire.

Question whether it was a physical impossibility for sparks from the engine to have ignited certain car was for jury. *Cincinnati, etc., Ry. Co. v. Cecil (Ky.)*, 607.

That building was on fire soon after locomotive passed was sufficient evidence of. *St. Louis, etc., Ry. Co. v. Dawson (Ark.)*, 612.

Presumptions.

Presumption of negligence from origin of fire. *St. Louis, etc., Ry. Co. v. Dawson (Ark.)*, 612.

Presumption of negligence from origin of fire. *Shipman v. Chicago, B. & Q. R. Co. (Neb.)*, 748.

Presumption of negligence from origin of fire, error to instruct jury that, if evidence is evenly balanced on question of defendant's negligence, they should find for plaintiff. *Shipman v. Chicago B. & Q. R. Co. (Neb.)*, 748.

FOREIGN CORPORATIONS.

See RAILROAD COMMISSIONS.

FOREIGN LAWS.

See DEATH BY WRONGFUL ACT; FELLOW SERVANTS; LICENSEES; FRIGHTENING TEAMS.

Complaint was not demurrable for not averring that hand car on farm crossing in question was calculated to frighten teams of ordinary gentleness. *Baltimore & O. S. W. R. Co. v. Slaughter (Ind.)*, 333.

Complaint was not objectionable for failure to aver that mule was an animal of ordinary gentleness. *Baltimore & O. S. W. R. Co. v. Slaughter (Ind.)*, 333.

Fact that hand car was not left within traveled way of farm crossing, as alleged in complaint, would not preclude recovery, if the car was negligently left near the traveled way, and was calculated to frighten teams using the crossing of ordinary gentleness. *Baltimore & O. S. W. R. Co. v. Slaughter (Ind.)*, 333.

Variance was immaterial where plaintiff alleged that hand car was negligently left on farm crossing, and proof was that car was not within traveled way of the crossing. *Baltimore & O. S. W. R. Co. v. Slaughter (Ind.)*, 333.

Whether act of placing hand car within limits of farm crossing was so calculated to frighten passing teams as to render it negligent to do such an act was mixed question of law and fact, which was presented by the issue formed on the allegation that the act was negligently done. *Baltimore & O. S. W. R. Co. v. Slaughter (Ind.)*, 333.

GRANTS.

See RIGHT OF WAY.

GROSS NEGLIGENCE.

See DAMAGES.

HUSBAND AND WIFE.

See PERSONAL INJURIES.

IMPUTED NEGLIGENCE.

If person is injured, in part by negligence of another and in part by insufficiency of the driver, horse, or carriage by which he was being conveyed, which insufficiency was due to his own want of care in selecting them, no recovery can be had, not because of the driver's negligence, or the defect in horse, harness, or carriage was imputable to the person injured, but because his own fault in selecting them was proximate cause of the injury. *Hanson v. Manchester St. Ry. (N. H.)*, 675.

Negligence of driver, causing collision with street car, was not imputable to boy riding in vehicle. *Peterson v. St. Louis Transit Co. (Mo.)*, 732.

Negligence of driver of hose wagon was not imputable to member of fire department killed in collision between the wagon and street car. *McBride v. Des Moines City Ry. Co. (Iowa)*, 318.

Negligence of mother or third party not imputable to child. *Atchison, etc., Ry. Co. v. Calhoun (Okla.)*, 791.

INJUNCTIONS.

See INTERSTATE COMMERCE.

INSTRUCTIONS.

See CARRIERS OF LIVE STOCK; CONTRIBUTORY NEGLIGENCE; CROSSINGS; FIRES SET BY LOCOMOTIVES; MASTER AND SERVANT; NEGLIGENCE; STREET RAILWAYS.

INTEREST.

See EMINENT DOMAIN.

INTERSTATE COMMERCE.

See CONNECTING CARRIERS; FEDERAL JURISDICTION.

Carrier which has been adjudged to have violated act to regulate commerce in a specific particular may be restrained from further like violations of the act, but should not be enjoined from violating the act in the future in any particular. *New York, etc., R. Co. v. Interstate Com. Comm'n (U. S.)*, 438.

Discrimination.

Interstate carrier stipulating to sell and transport coal at an agreed price, insufficient to yield its published freight rates after deducting cost of purchase and delivery. *New York, etc., R. Co. v. Interstate Com. Comm'n (U. S.)*, 438.

Pooling of freights of competing railroads, when not accomplished by adoption of certain rule by carriers, providing for routing by initial carrier. *Southern Pac. Co., etc., v. Interstate Com. Comm'n (U. S.)*, 490.

Prohibitions of act to regulate commerce as to rebates, etc., are inapplicable to freight rates for coal charged by interstate carriers empowered to mine and market coal, by legislation existing at time of adoption, of such act. *New York, etc., R. Co. v. Interstate Com. Comm'n (U. S.)*, 438.

Order of Interstate Commerce Commission directing common carriers to desist from maintaining or enforcing a rule adopted

INTERSTATE COMMERCE—Continued.

by them, when Federal Circuit Court may decree enforcement of. *Southern Pac. Co., etc. v. Interstate Com. Comm'n* (U. S.), 490.

Question whether certain schedule of interstate freight rates filed with interstate commerce commission was posted as required by the act to regulate commerce is not open in Supreme court of United States, under certain circumstances. *Texas, etc., Ry. Co. v. Abilene Cotton Oil Co.* (U. S.), 816.

Remedy for exacting unreasonable interstate rate, and necessity of action by interstate commerce commission. *Texas, etc., Ry. Co. v. Abilene Cotton Oil Co.* (U. S.), 816.

Statute of Illinois requiring railroads to make certain reports to commissioners is not void under commerce clause of federal constitution. *People v. Chicago, I. & L. Ry. Co.* (Ill.), 233.

JOINT TORT FEASORS.

See TRESPASS.

JOINT TORTS.

See MASTER AND SERVANT.

JURISDICTION.

See FEDERAL COURTS.

LAST CLEAR CHANCE.

See LICENSEES; STREET RAILWAYS.

LEASES AND RUNNING POWERS.

See CARRIERS OF PASSENGERS.

Railroad cannot escape liability for negligence at a crossing by turning over operation of its road to another railroad company. *Harbert v. Atlanta, etc., Ry. Co.* (S. Car.), 681.

Tracks of other company in street, liability of company using them for switching purposes for injuries to vehicles occasioned by hole in track. *Collier v. Great Northern Ry. Co.* (Wash.), 631.

LICENSEES.

See TRESPASSERS.

Bare licensee assumes perils arising from defects existing in premises of another. *Baltimore & O. S. W. R. Co. v. Slaughter* (Ind.), 333.

Care due bare licensees on railroad tracks before discovery of their peril. *Chesapeake & O. Ry. Co. v. Farrow's Adm'x* (Va.), 360.

Contributory Negligence.

Care required of licensee when walking on railroad track. *Chesapeake & O. Ry. Co. v. Farrow's Adm'x* (Va.), 360.

Interstate, employee of oil mills company killed by negligence in switching car, while standing on his employer's track, was not guilty of contributory negligence as matter of law. *Hudson v. Atlantic Coast Line R. Co.* (N. Car.), 305.

Licensee walking on railroad track was chargeable with knowledge that usual method of shifting cars at place of accident was by making flying switches, as such method had been in constant use for many years. *Chesapeake & O. Ry. Co. v. Farrow's Adm'x* (Va.), 360.

Degree of care due mere licensee killed while crossing track in depot yard. *Illinois Cent. R. Co. v. Willis' Adm'r* (Ky.), 312.

Degree of care due mere permissive licensee. *Peterson v. South & W. R. R.* (N. Car.), 355.

Evidence showed that railroad was not negligent with respect to bare licensee on its track. *Chesapeake & O. Ry. Co. v. Farrow's Adm'x* (Va.), 360.

LICENSEES—Continued.

Last clear chance doctrine was not applicable; it appearing that trainman did not see deceased licensee, being engaged in performance of duty which he could not neglect. *Chesapeake & O. Ry. Co. v. Farrow's Adm'x* (Va.), 360.

Liability for injury to permissive licensee caused by jerking of train. *Peterson v. South & W. R. R.* (N. Car.), 355.

Person on train at station to buy from vender of fruit, etc., injured by reason of jerking of train, liability of railroad dependent upon existence of wanton negligence. *Peterson v. South & W. R. R.* (N. Car.), 355.

Railroad was guilty of negligence in moving cars on spur track, which was proximate cause of death of employee of oil mills company, who was standing on latter's yard track when struck by car. *Hudson v. Atlantic Coast Line R. Co.* (N. Car.), 305.

Trespasser or licensee in railroad stock-yard thrown from buggy as result of freight occasioned his horse by extraordinary noise from collision of cars, railroad not liable. *Johnson v. Louisville & N. R. Co.* (Ky.), 658.

Who Are Licensees.

Person in depot yard for purpose of conversing with persons loading cars. *Illinois Cent. R. Co. v. Willis' Adm'r* (Ky.), 312.

Persons boarding trains at stations to buy from venders of fruit. *Peterson v. South & W. R. R.* (N. Car.), 355.

Presumptive right to cross railroad tracks, at point not a highway or street crossing, cannot be acquired, under certain statute, even by long user, where it is necessary to walk along the tracks of an intersecting railroad to reach such point of crossing. *Keller v. Erie R. Co.* (N. Y.), 599.

Tenant of adjoining owner, in using farm crossing over railroad tracks, assumed risk of defects in the crossing, though railroad's intent in constructing and maintaining the crossing was never communicated to any one, and the tenant acted on assumption that crossing was designed for his use. *Baltimore & O. S. W. R. Co. v. Slaughter* (Ind.), 333.

LIENS.

See COMMON CARRIERS.

LIFE TABLES.

See PERSONAL INJURIES.

LIMITING LIABILITY.

See COMMON CARRIERS; MASTER AND SERVANT.

LOGGING RAILROADS.

See MASTER AND SERVANT.

MALICE.

See ATTACHMENT.

MANDAMUS.

Court has no power to issue peremptory mandamus without notice in action brought to compel railroad to furnish cars to shipper at a certain time and place. *State v. Harrington* (Neb.), 835.

MASTER AND SERVANT.

See CONTRIBUTORY NEGLIGENCE; CROSSINGS; EMPLOYERS' LIABILITY ACTS; FEDERAL JURISDICTION; FELLOW SERVANTS.

Accidents on Track.

Care due from trainmen to brakeman stationed at curve of track

MASTER AND SERVANT—Continued.

- to repeat signals. *Cincinnati, etc., Ry. Co. v. Hill's Adm'r (Ky.)*, 52.
- Degree of care required of trainmen after they were chargeable with notice of brakeman's danger of being run over. *Cincinnati, etc., Ry. Co. v. Hill's Adm'r (Ky.)*, 52.
- Duty of trainmen to give warning when train was approaching point where brakeman was struck. *Cincinnati, etc., Ry. Co. v. Hill's Adm'r (Ky.)*, 52.
- Evidence was insufficient to sustain finding that trainmen were chargeable with notice of deceased brakeman's position on track. *Cincinnati, etc., Ry. Co. v. Hill's Adm'r (Ky.)*, 52.
- Lookout, duty of trainmen to keep when train was approaching point where brakeman was struck. *Cincinnati, etc., Ry. Co. v. Hill's Adm'r (Ky.)*, 52.
- Negligence in switching, question for jury. *Pittsburg, etc., Ry. Co. v. Bovard (Ill.)*, 122.
- Negligence of conductor and engineer of train on which deceased was employed in starting portion of it without first ascertaining that deceased was not between cars, sufficiency of evidence. *Louisville & N. R. Co. v. Vincent (Tenn.)*, 415.
- Negligent failure to block tracks in switchyard, sufficiency of evidence of. *Lee v. Missouri Pac. Ry. Co. (Mo.)*, 375.
- Ordinances regulating operations of railroads, violation of as negligence per se, sufficient to sustain recovery for injury to servant. *Pittsburgh, etc., Ry. Co. v. Lightheiser (Ind.)*, 130.
- Railroad was chargeable with negligence of switching crew in failing to maintain lookout for persons on track, in action for death of its brakeman. *Cincinnati, etc., Ry. Co. v. Hill's Adm'r (Ky.)*, 52.
- Speed of train which struck brakeman was not negligent, in absence of any applicable speed rule. *Cincinnati, etc., Ry. Co. v. Hill's Adm'r (Ky.)*, 52.
- Sufficiency of evidence of negligence where section hand was killed by train while helping to remove hand car from track, under orders of his foreman. *St. Louis & N. A. R. Co. v. Mathis (Ark.)*, 538.
- Anterior negligence of one defendant does not shield another defendant from responsibility for its own negligence in failing to inspect, so as to provide safe place for its employees to work. *Campbell v. Railway Transfer Co. (Minn.)*, 61.

Appliances.

- Care required of master in furnishing and maintaining appliances. *Moore v. Southern Ry. Co. (N. Car.)*, 635.
- Care required of master in furnishing and maintaining appliances. *Shandrew v. Chicago, etc., Ry. Co. (C. C. A.)*, 588.
- Care requiring of master in inspecting and testing air brake hose on freight car, certain instructions were correct, as merely stating in amplified form the rule of ordinary care. *Shandrew v. Chicago, etc., Ry. Co. (C. C. A.)*, 588.
- Certain instruction was properly modified by adding the words "unless the jury further find that the block system (to prevent collisions) was a safer system and was in general use by railroads in the United States of like character" to that operated by defendant. *Stewart v. Raleigh, etc., R. Co. (N. Car.)*, 572.
- Certain modification of instruction was not objectionable as requiring defendant to provide the most approved appliances for preventing collisions between trains. *Stewart v. Raleigh, etc., R. Co. (N. Car.)*, 572.
- Defective car, sufficiency of complaint in action for injuries to switchman. *New York, etc., R. Co. v. Hamlin (Ind.)*, 701.
- Degree of care required of master with respect to safety of

MASTER AND SERVANT—Continued.

- the condition of material with which its servant is put to work. *Collins v. Louisville & N. R. Co. (Ky.)*, 78.
- Degree of care required of railroad, as master, in providing signal system and other switching appliances. *McGregor v. Pennsylvania R. Co. (Pa.)*, 76.
- In view of testimony showing that it was not customary for other railroad companies to test air brake hose by subjecting it to pressure in excess of that which it was subjected in use, it was not error to charge that defendant was not negligent because of its failure to apply such test. *Shandrew v. Chicago, etc., Ry. Co. (C. C. A.)*, 588.
- Liability of railroad where engineer was injured by reason of cup being snapped from driving rod, in consequence of worn condition of engine. *Moore v. Southern Ry. Co. (N. Car.)*, 635.
- Master is not bound at all hazards to know as to safety of the condition of material with which its servant is put to work. *Collins v. Louisville & N. R. Co. (Ky.)*, 78.
- Negligence was question for jury where brakeman was shaken off pilot of engine which did not have a bar to hold by. *Biles v. Seaboard Air Line Ry. Co. (N. Car.)*, 47.
- Question for jury whether failure to install block system, to prevent collisions, was negligence. *Stewart v. Raleigh, etc., R. Co. (N. Car.)*, 572.
- Railroad is not negligent in failing to provide automatic signals in its switch yard, where it does not appear that the signal system provided is not the same as that ordinarily used by railroads, or that it is dangerous. *McGregor v. Pennsylvania R. Co. (Pa.)*, 76.
- Sufficiency of whistle on lodging engine was question for jury. *Conine v. Olympia Logging Co. (Wash.)*, 568.
- Telegraph stations, railroad is only bound to establish such as are necessary for proper running of trains, with regard to safety of its employees and passengers. *Stewart v. Raleigh, etc., R. Co. (N. Car.)*, 572.

Assumption of Risk.

- Burden of proof. *Arenschield v. Chicago, etc., Ry. Co. (Iowa)*, 41.
- Danger brought about by negligence of master, where, to the knowledge of the injured employee, the work is commonly done in the negligent manner which caused the accident. *Gulf, etc., Ry. Co. v. Huyett (Tex.)*, 637.
- Defense of is not available to a defendant not an employer of the person injured. *Campbell v. Railway Transfer Co. (Minn.)*, 61.
- Employee, who while coming down side of one car, was injured by one end of a grain-door board resting against a cleat supporting the foot-board on top of another car and protruding over side of that other car, which was standing on an adjoining track, did not as a matter of law, assume such risk. *Campbell v. Railway Transfer Co. (Minn.)*, 61.
- Employers' liability act, effect of application of. *Biles v. Seaboard Air Line Ry. Co. (N. Car.)*, 47.
- Evidence was sufficient, under laws of Kansas, to require submission to jury of question whether deceased switchman was aware of danger from unblocked rails in switchyard. *Lee v. Missouri Pac. Ry. Co. (Mo.)*, 375.
- Habitual negligence of master. *Arenschield v. Chicago, etc., Ry. Co. (Iowa)*, 41.
- Instructions were properly refused because they disregarded question as to whether or not the danger was such that the deceased servant might reasonably have hoped to avoid it

MASTER AND SERVANT—Continued.

- by use of ordinary care. *Lee v. Missouri Pac. Ry. Co.* (Mo.), 375.
- Negligence of master. *Gulf, etc., Ry. Co. v. Huyett* (Tex.), 637.
- Question for jury whether it had been customary to so operate engines and cars that deceased employee must have known of the danger. *Arenschield v. Chicago, etc., Ry. Co.* (Iowa), 41.
- Servant's knowledge of danger. *Lee v. Missouri Pac. Ry. Co.* (Mo.), 375.
- Sufficiency of evidence to sustain burden of proof. *Arenschield v. Chicago, etc., Ry. Co.* (Iowa), 41.
- Burden on plaintiff to show negligence of master, in action for death of railroad employee. *Norfolk & W. Ry. Co. v. McDonald's Adm'x* (Va.), 101.
- Certain facts did not establish railroad's negligence, in action for death of its employee, sustained while he was engaged in unloading car. *Norfolk & W. Ry. Co. v. McDonald's Adm'x* (Va.), 101.
- Certain instruction was properly modified by adding a clause requiring that the running of an engine with such a crew on such a trip as the one in question was reasonably safe, etc. *Stewart v. Raleigh, etc., R. Co.* (N. Car.), 572.

Contributory Negligence.

- Brakeman climbing down side of box car. *St. Louis, etc., Ry. Co. v. Caraway* (Ark.), 532.
- Brakeman riding on pilot without having any rod by which to hold, while he may be charged with assumption of risk, may not be guilty of contributory negligence. *Biles v. Seaboard Air Line Ry. Co.* (N. Car.), 47.
- Brakeman's act in going on track in front of approaching train prevented recovery for his death. *Cincinnati, etc., Ry. Co. v. Hill's Adm'r* (Ky.), 52.
- Dangerous work. *Biles v. Seaboard Air Line Ry. Co.* (N. Car.), 47.
- Degree of care required of brakeman to avoid being struck by train while stationed at curve to repeat signals. *Cincinnati, etc., Ry. Co. v. Hill's Adm'r* (Ky.), 52.
- Degree of care required of engineer while standing near track. *Pittsburg, etc., Ry. Co. v. Lightheiser* (Ind.), 130.
- Employee required to stand near track killed by reason of collision between caboose and engine, question for jury. *Pittsburg, etc., Ry. Co. v. Bovard* (Ill.), 122.
- Engineer was not responsible where train was moved by order of conductor, his superior, contrary to orders. *Wilson v. Southern Ry.* (S. Car.), 548.
- Error for trial court to instruct that if injured engineer exercised the care to keep his train under control ordinarily exercised by engineers under like circumstances he was not guilty of contributory negligence. *Maehren v. Great Northern Ry. Co.* (Minn.), 564.
- Evidence was sufficient, under laws of Kansas, to require submission to jury of question whether switchman, alleged to have been killed by reason of failure to block rails, was guilty of contributory negligence. *Lee v. Missouri Pac. Ry. Co.* (Mo.), 375.
- Fact that act of engineer is done in presence and under direction of conductor of train, his superior, is equivalent to assurance by master that servant may safely proceed to do the work required of him. *Wilson v. Southern Ry.* (S. Car.), 548.
- Failure of injured engineer to comply with rule as to having train under control, sufficiency of evidence. *Maehren v. Great Northern Ry. Co.* (Minn.), 564.

MASTER AND SERVANT—Continued.

- If compliance by servant with master's general rule is rendered impossible by inconsistent orders and duties, negligence cannot be imputed to the servant for not following the general rule. *Maehren v. Great Northern Ry. Co. (Minn.)*, 564.
- Injured employee was not guilty of as a matter of law. *Campbell v. Railway Transfer Co. (Minn.)*, 61.
- Instruction that if deceased engineer, killed in a collision, saw witness, or by exercise of ordinary care could have seen him, wave his hat, it was deceased's duty to have stopped his engine, and, if his failure to do so was proximate cause of his injury, he was guilty of contributory negligence, was proper. *Stewart v. Raleigh, etc., R. Co. (N. Car.)*, 572.
- "Look and listen" rule does not apply in all strictness to railroad employees required to remain on or about the track. *Pittsburg, etc., Ry. Co. v. Lightheiser (Ind.)*, 130.
- Mere fact that brakeman was injured in coupling cars with a link and pin coupling, used by his company in violation of Act of Congress of March 2, 1893, c. 196, creates no presumption that he was negligent. *Denver & R. G. R. Co. v. Arrighi (C. C. A.)*, 545.
- Obeys instructions of representative of master on the spot. *Wilson v. Southern Ry. (S. Car.)*, 548.
- Presumption of due care on part of deceased engineer, killed in a collision. *Stewart v. Raleigh, etc., R. Co. (N. Car.)*, 572.
- Question whether switchman was negligent in attempting to couple cars as he did, and also whether, if so, his negligence was a proximate cause of his injury by reason of an unblocked frog, were questions for jury. *Taggart v. Republic Iron & Steel Co. (C. C. A.)*, 511.
- Riding in dangerous position. *Biles v. Seaboard Air Line Ry. Co. (N. Car.)*, 47.
- Rule of master violated by injured servant. *Pittsburg, etc., Ry. Co. v. Lightheiser (Ind.)*, 130.
- Section hand, killed by train while helping to remove hand car from track, was not guilty of negligence in obeying orders of foreman and in relying on his vigilance. *St. Louis & N. A. R. Co. v. Mathis (Ark.)*, 538.
- Switchman's negligence in selecting dangerous method of making coupling, and not the nail protruding from brake beam, was proximate cause of his injury, and precluded recovery. *New York, etc., R. Co. v. Hamlin (Ind.)*, 701.
- Violation by servant of impliedly abrogated rule. *St. Louis, etc., Ry. Co. v. Caraway (Ark.)*, 532.
- Violation of master's rule by injured engineer. *Maehren v. Great Northern Ry. Co. (Minn.)*, 564.
- Violation of master's rule by servant. *St. Louis, etc., Ry. Co. v. Caraway (Ark.)*, 532.
- Violation of master's rules. *Biles v. Seaboard Air Line Ry. Co. (N. Car.)*, 47.
- Where engineer was killed in collision, burden was on railroad to remove presumption that deceased exercised due care for his own safety and was not guilty of contributory negligence. *Stewart v. Raleigh, etc., R. Co. (N. Car.)*, 572.
- Death of fireman while removing snow from track in consequence of locomotive's derailment was caused by negligence of the railroad itself in the conduct of the work. *Neagle v. Syracuse, etc., R. Co. (N. Y.)*, 89.
- Degree of care required of master. *Stewart v. Raleigh, etc., R. Co. (N. Car.)*, 572.
- Degree of care required of master in furnishing safe fuel for locomotives. *Vissman v. Southern Ry. Co. (Ky.)*, 57.

MASTER AND SERVANT—Continued.**Evidence.**

Erroneous admission of evidence that certain other railways having switchyards in the town had their tracks blocked was harmless. *Lee v. Missouri Pac. Ry. Co. (Mo.)*, 375.

Evidence that brakeman, who was killed while standing on main track repeating signals, could have stood between the two tracks or a few feet north or south of where he was, and been in a place of safety, was admissible. *Cincinnati, etc., Ry. Co. v. Hill's Adm'r (Ky.)*, 52.

Not error to refuse to permit train dispatcher to answer whether engine which deceased was running at time of accident was operating solely under telegraphic orders. *Stewart v. Raleigh, etc., R. Co. (N. Car.)*, 572.

Of general custom in well equipped switchyards to have tracks blocked was admissible, but evidence that one or two other companies blocked their tracks, was not. *Lee v. Missouri Pac. Ry. Co. (Mo.)*, 375.

Rule of railroad requiring employees in charge of trains to report obstructions of the road to superintendent, to repair damages, etc., was properly admitted in evidence, in action for injury to fireman, resulting from negligence of conductor of another train in causing an obstruction to be thrown upon the track. *Cincinnati, etc., Ry. Co. v. Curd (Ky.)*, 69.

Time-table, and train sheets of day on which collision occurred. *Stewart v. Raleigh, etc., R. Co. (N. Car.)*, 572.

What constituted train crew generally and what was proper train crew for light engine were proper subjects for expert testimony. *Stewart v. Raleigh, etc., R. Co. (N. Car.)*, 572.

Exemption from Liability.

Contract of student brakeman was against public policy. *Atchison, etc., Ry. Co. v. Fronk (Kan.)*, 95.

Validity, under S. Car. Const. 1895, art. 9, § 15, of implied agreement to release railroad from liability to engineer for negligence of conductor occurring while they were working under rule providing that engineer shall be jointly liable with the conductor for the movement of the trains. *Wilson v. Southern Ry. (S. Car.)*, 548.

Fact that air brake hose on freight train did burst by reason of its defective condition was not of itself sufficient evidence of master's negligence. *Shandrew v. Chicago, etc., Ry. Co. (C. C. A.)*, 588.

Foreign cars, degree of care required of master in inspecting. *New York, etc., R. Co. v. Hamlin (Ind.)*, 701.

Foreign cars, duties of receiving railroad to its employees. *New York, etc., R. Co. v. Hamlin (Ind.)*, 701.

Instruction that "defendant (master of injured brakeman) cannot be held liable in this case merely because of the fact that the hose (of air brake on freight car) which burst was a spliced hose" was correct. *Shandrew v. Chicago, etc., Ry. Co. (C. C. A.)*, 588.

Joint liability of master and servant, for latter's negligence, effect of verdict for servant where right to recover against master was dependent on doctrine of respondeat superior. *McGinnis v. Chicago, etc., Ry. Co. (Mo.)*, 715.

Joint liability of master and servant to third persons for servant's acts. *McGinnis v. Chicago, etc., Ry. Co. (Mo.)*, 715.

Liability of master to third persons for acts or omissions of servants. *McGinnis v. Chicago, etc., Ry. Co. (Mo.)*, 715.

Liability of railroad depended on whether it was negligent in the conduct of the work, and not whether it was negligent in failing to furnish safe place to work. *Neagle v. Syracuse, etc., R. Co. (N. Y.)*, 89.

MASTER AND SERVANT—Continued.

Master is liable for its own negligence as to the conduct of work, but not for the negligence of a fellow servant. *Neagle v. Syracuse, etc., R. Co. (N. Y.), 89.*

Negligence of railroad in providing poor quality of coal for use in locomotives, insufficiency of evidence of where fireman was injured by piece of coal flying into his eye. *Vissman v. Southern Ry. Co. (Ky.), 57.*

Presumption of negligence does not arise from mere proof of injury to servant. *Vissman v. Southern Ry. Co. (Ky.), 57.*

Presumption of negligence on part of master from fact of collision between freight train and light engine, in day time, resulting in death of engineer. *Stewart v. Raleigh, etc., R. Co. (N. Car.), 572.*

Proximate cause of injury to fireman was negligence of conductor of other train, when acting as vice principal, in failing to warn approaching train of obstruction on track. *Cincinnati, etc., Ry. Co. v. Curd (Ky.), 69.*

Question of master's negligence and of deceased engineer's contributory negligence were questions for jury, in action for death of engineer, caused by collision between train and engine. *Stewart v. Raleigh, etc., R. Co. (N. Car.), 572.*

Release of Claim.

Right of employee to have settlement with employer set aside for misrepresentations as to his condition by physician in master's employ. *Gulf, etc., Ry. Co. v. Huyett (Tex.), 637.*

Rules.

Abrogated by nonobservance. *Biles v. Seaboard Air Line Ry. Co. (N. Car.), 47.*

Conductor's knowledge of habitual violation of rule regulating brakemen was imputable to railroad, as it was the duty of conductors to enforce it. *St. Louis, etc., Ry. Co. v. Caraway (Ark.), 532.*

Duty of master to promulgate and enforce rules for the running of trains over a construction line. *Morrison v. San Pedro, etc., R. Co. (Utah), 690.*

Knowledge on part of railroad of violation of rule regulating brakemen may be inferred from notoriety of the habitual custom of employees to disregard the rule. *St. Louis, etc., Ry. Co. v. Caraway (Ark.), 532.*

Proper to refuse to permit expert train dispatcher to explain effect of rules, which were couched in ordinary language. *Stewart v. Raleigh, etc., R. Co. (N. Car.), 572.*

Railroad not absolutely required to adopt and promulgate code of rules for education of beginners prior to inducting them into its service. *Louisville & N. R. Co. v. Vincent (Tenn.), 415.*

Violation of rules, liability of master for injury to servant. *Morrison v. San Pedro, etc., R. Co. (Utah), 690.*

Safe place to work, duty to furnish is a nonassignable one. *Neagle v. Syracuse, etc., R. Co. (N. Y.), 89.*

Scope of Employment.

Master and servant are jointly liable for willful tort of servant committed in scope of his employment. *Able v. Southern Ry. (S. Car.), 115.*

Test for railroad's liability for assault on its employee was, not whether the act was done by its yardmaster while he was on duty or engaged in his duties, but whether it was done within the scope of his employment, and in the prosecution of the business. *Roberts v. Southern Ry. Co. (N. Car.), 106.*

When it is shown that one defendant was in the habit, when unloading cars, of placing boards, used for the purpose of closing car doors, upon the top of such cars, and another defendant was

MASTER AND SERVANT—Continued.

in the habit of receiving such cars with admitted knowledge of such custom, the question of negligence as to both defendants was properly one of fact for the jury. *Campbell v. Railway Transfer Co. (Minn.)*, 61.

Who Are Employees.

Flagman was employee of both railroad companies. *Louisville, etc., Ry. Co. v. Illinois Cent. R. Co. (Ky.)*, 653.

Servant of railroad, while riding to work, was an employee, although operation of the car was in violation of statute making it an offense to work on Sunday. *Shannon v. Union R. Co. (R. I.)*, 80.

Student brakeman. *Atchison, etc., Ry. Co. v. Fronk (Kan.)*, 95.

MILEAGE BOOKS.

See **TICKETS AND FARES.**

NEGLIGENCE.

See **CARRIERS OF LIVE STOCK; CHILDREN; CONTRIBUTORY NEGLIGENCE; CROSSINGS; FIRES SET BY LOCOMOTIVES; IMPUTED NEGLIGENCE; LEASES AND RUNNING POWERS; LICENSEES; MASTER AND SERVANT; RAILROADS IN STREETS; STOCK, INJURIES TO; STREET RAILWAYS; TRESPASSERS.**

Assumption of risk, defense of is not available to a defendant not an employer of the person injured. *Campbell v. Railway Transfer Co. (Minn.)*, 61.

Definition of reasonable care, etc. *Raymond v. Portland R. Co. (Me.)*, 476.

Error to suggest in instruction that jury should consider certain facts from which negligence might be inferred, and omit reference to facts favorable to defendant. *McBride v. Des Moines City Ry. Co. (Iowa)*, 318.

Evidence.

Precautions against recurrence of injury. *Beverley v. Boston Elevated Ry. Co. (Mass.)*, 753.

That other horses had received similar electric shocks by stepping on street railway track at other places. *Vicksburg Ry. & Light Co. v. Miles (Miss.)*, 94.

Gross negligence in backing train over crossing, what did not constitute. *Baker v. Tacoma Eastern Ry. Co. (Wash.)*, 723.

Ordinary care, correct definition of. *Louisville & N. R. Co. v. Lucas' Adm'r (Ky.)*, 739.

Pleading.

Plaintiff was entitled to recover if he established that injury complained of was result of any one or more of the acts of negligence alleged in complaint. *Pittsburg, etc., Ry. Co. v. Lightheiser (Ind.)*, 130.

Where no objection was made at trial that the negligence alleged did not cover a certain question, the objection was not open on appeal. *Beverley v. Boston Elevated Ry. Co. (Mass.)*, 753.

Where petition is defective as alleging repugnant grounds of negligence in same count the defect can only be reached by demurrer or motion to elect. *McQuade v. St. Louis & Suburban Ry. Co. (Mo.)*, 727.

Proximate Cause.

Degree of care required to prevent infliction of injury is always proportioned to probability that exists that an injury will be done under circumstances which are known to exist, or, from past experience, may be reasonably expected to exist in a

NEGLIGENCE—Continued.

particular case. *Chesapeake & O. Ry. Co. v. Farrow's Adm'x* (Va.), 360.

Not essential that particular manner in which injury occurred should have been anticipated. *Hudson v. Atlantic Coast Line R. Co.* (N. Car.), 305.

Not necessary, in order to justify submission of question of negligence, that it should appear that the effect of act or omission complained of would in all cases, or even ordinarily, produce the consequences which followed. *Baltimore & O. S. W. R. Co. v. Slaughter* (Ind.), 333.

Question of negligence is ordinarily one of fact, and not of law. *United Rys. & Elec. Co. v. Weir* (Md.), 472.

When question for jury. *United Rys. & Elec. Co. v. Watkins* (Md.), 641.

NEW TRIAL.

See DEATH BY WRONGFUL ACT.

NOTICE OF CLAIM.

See BILLS OF LADING.

NUISANCES.

Legislature may legalize nuisance committed by railroad, provided damages be fully compensated. *Rainey v. Red River, T. & S. Ry. Co.* (Tex.), 399.

While railroad is empowered absolutely under constitution and laws of Texas, to select such right of way as it deems most advantageous to its enterprise, yet, in selecting land for its machine shops, it cannot act arbitrarily and without reference to damage to property in the vicinity or to the discomfort of residents. *Rainey v. Red River, T. & S. Ry. Co.* (Tex.), 399.

OFFER OF SETTLEMENT.

See EVIDENCE.

ORDINANCES.

See MASTER AND SERVANT; STREET RAILWAYS.

PARENT AND CHILD.

See DEATH BY WRONGFUL ACT; IMPUTED NEGLIGENCE.

PARTIES.

See DEATH BY WRONGFUL ACT; FEDERAL JURISDICTION.

PARTNERSHIP.

See CONNECTING CARRIERS.

PERSONAL INJURIES.

See CHILDREN; DEATH BY WRONGFUL ACT; MASTER AND SERVANT; NEGLIGENCE.

Damages.

Certain paragraph of petition was subject to demurrer upon ground that "there is no itemized bill of particulars of the medical bill, loss of time, or nurse's attention sued for." *Turley v. Atlanta, K. & N. Ry. Co.* (Ga.), 842.

Damages claimed because of loss of services and companionship of plaintiff's wife, and because of expenses incurred in giving her medical attention, were not the natural consequences of the alleged tortious act. *Sappington v. Atlanta & W. P. R. Co.* (Ga.), 846.

PERSONAL INJURIES—Continued.

Excessive verdict for injuries to fireman. Cincinnati, etc., Ry. Co. *v.* Curd (Ky.), 69.

Measure and elements of damages. Cincinnati, etc., Ry. Co. *v.* Giboney (Ky.), 803.

Medical expenses, right of married woman to recover in action for her injuries. Indianapolis Trac. & Term. Co. *v.* Kidd (Ind.), 366.

Mere fact that plaintiff had chronic sore eyes did not warrant damages predicated on permanent injury to her eyes. Louisville & N. R. Co. *v.* Eaden (Ky.), 119.

Verdict for injuries to legs was not excessive. Campbell *v.* Railway Transfer Co. (Minn.), 61.

Evidence.

Carlisle mortality tables. Pittsburg, etc., Ry. Co. *v.* Lighthouse (Ind.), 130.

Was not error to permit plaintiff to exhibit his injured foot to jury, and to testify that it was stiff at the ankle joint, and by movements show effects of injury on his ability to use it. Pittsburg, etc., Ry. Co. *v.* Lighthouse (Ind.), 130.

PLEADING.

See CARRIERS OF LIVE STOCK; COMMON CARRIERS; CROSSINGS; DEATH BY WRONGFUL ACT; FRIGHTENING TEAMS; NEGLIGENCE; PERSONAL INJURIES; STREET RAILWAYS.

POLICE OFFICERS.

See CARRIERS OF PASSENGERS.

POSTAL CLERKS.

See CARRIERS OF PASSENGERS.

PRESUMPTIONS.

See CARRIERS OF LIVE STOCK; CROSSINGS; DAMAGES; MASTER AND SERVANT; RIGHT OF WAY; STOCK, INJURIES TO.

PRIVATE CROSSINGS.

See LICENSEES.

PRIVATE RAILROADS.

See EMPLOYERS' LIABILITY ACTS.

PROXIMATE CAUSE.

See MASTER AND SERVANT; NEGLIGENCE; PERSONAL INJURIES; STREET RAILWAYS.

PUBLIC LANDS.

Right of federal government to sue railroad company to recover value of lands erroneously patented to such company, and sold by it to persons who dealt with it in good faith. Southern Pac. R. Co. *v.* United States (U. S.), 394.

RAILROAD COMMISSIONS.

See INTERSTATE COMMERCE.

Hurd's Rev. St. 1901, c. 114, § 6, requiring every railroad company "incorporated or doing business in the state, * * * to report to railroad commissioners as to affairs of the corporation, applies to foreign corporations, as well as to domestic ones. People *v.* Chicago, I. & L. Ry. Co. (Ill.), 233.

Power of state of Mississippi, under federal constitution, to es-

RAILROAD COMMISSIONS—Continued.

tablish certain flat rate on grain carried from Vicksburg to Meridian over certain railroad. Alabama, etc., Ry. Co. *v.* Railroad Commission (U. S.), 861.

RAILROADS.

See BRIDGES; CARRIERS; CORPORATIONS; EMINENT DOMAIN; EMPLOYERS' LIABILITY ACTS; FEDERAL COURTS; LEASES AND RUNNING POWERS; NUISANCES; PUBLIC LANDS; RIGHT OF WAY; STREET RAILWAYS; TRESPASS.

RAILROADS IN STREETS.

See LEASES AND RUNNING POWERS.

Certain pleading did not admit that defendant operated trains on tracks belonging to other company. Collier *v.* Great Northern Ry. Co. (Wash.), 631.

Last clear chance rule rendered defense of contributory negligence not available, in action for death resulting from collision on crossing. Reid *v.* Atlanta & C. Air Line Ry. Co. (N. Car.), 670.

Negligence to back engine over street crossing at night without any warning and without a man with light on it to keep lookout. Reid *v.* Atlanta & C. Air Line Ry. Co. (N. Car.), 670.

RATES.

See CONSTITUTIONAL LAW.

REBATING.

See INTERSTATE COMMERCE.

RELEASE OF CLAIM.

See MASTER AND SERVANT.

REMOVAL OF CAUSE.

See FEDERAL JURISDICTION.

RES IPSA LOQUITUR.

See MASTER AND SERVANT.

RIGHT OF WAY.

See EMINENT DOMAIN; NUISANCES.

Call of deed for railroad right of way will, if unexplained, be treated as a call for another tract of land, and will control conflicting calls for distance. Couch *v.* Texas & P. Ry. Co. (Tex.), 406.

Conflict between call of deed for distance and call for railroad right of way may be explained so as to show real intention of parties. Couch *v.* Texas & P. Ry. Co. (Tex.), 406.

Lack of any congressional authority in the successive grantees of railroad roadbed lying in District of Columbia to extend their title into that District could not affect their title if the original grantor had such authority. Chesapeake Beach Ry. Co. *v.* Washington, etc., Ry. Co. (U. S.), 390.

Possession of railroad roadbed will be presumed, in ejectment, to have followed title until dispossession by defendant took place, under certain circumstances. Chesapeake Beach Ry. Co. *v.* Washington, etc., Ry. Co. (U. S.), 390.

Railroad not having performed its agreement, requiring it to construct and operate railroad through certain village, within the time limited, and having wholly failed to perform one condition of the agreement, the owner of the land or her successors in title could revoke the license under which the railroad took possession and terminate any right in the railroad to possession of the land. Littlejohn *v.* Chicago, etc., Ry. Co. (Ill.), 409.

RIGHT OF WAY—Continued.

Railroad right of way is not a public highway, in such sense as to make a deed calling for a right of way as a boundary convey owner's interest in land between the boundary of the right of way and railroad track. *Couch v. Texas & P. Ry. Co. (Tex.)*, 406.

Right of way agreement was a mere license to railroad to enter upon the land to construct its road and operate its trains, and gave it mere right to possession of the land, and conferred on it no title. *Littlejohn v. Chicago, etc., Ry. Co. (Ill.)*, 409.

Subsequent deed did not except from grant the strip promised to the railroad in prior right of way agreement, or recognize title to be in it. *Littlejohn v. Chicago, etc., Ry. Co. (Ill.)*, 409.

Waiver of right of land owner to insist upon performance of conditions of right of way agreement by railroad. *Littlejohn v. Chicago, etc., Ry. Co. (Ill.)*, 409.

Where property owner agreed to convey land to railroad, provided it should construct and operate its road through certain village within certain time, the conditions of the conveyance were conditions precedent. *Littlejohn v. Chicago, etc., Ry. Co. (Ill.)*, 409.

RULES.

See CARRIERS; FELLOW SERVANTS; MASTER AND SERVANT.

RUNNING POWERS.

See LEASES AND RUNNING POWERS.

STATIONS AND DEPOTS.

See CARRIERS OF PASSENGERS.

Application of West Virginia statute requiring railroads to provide water-closets "at all stations." *State v. Baltimore & O. R. Co. (W. Va.)*, 850.

Carrier was liable to its passengers for injuries resulting from defects in rules regulating use of station, which it was not controlling, but using under agreement with lessee of the station. *Kuhlen v. Boston & N. St. Ry. Co. (Mass.)*, 785.

STOCK AND STOCKHOLDERS.

See EMINENT DOMAIN; FEDERAL COURTS.

STOCK, INJURIES TO.

See EMINENT DOMAIN; NEGLIGENCE.

Evidence.

Evidence that train which collided with stock was behind time was admissible to show there was motive for not stopping it or for making rapid speed. *Southern Ry. Co. v. Puryear (Ga.)*, 751.

Lookouts.

Charges in behalf of railroad which did not postulate the fact that engineer of the train which killed plaintiff's cow was keeping proper lookout for animals on or near track, or that train was properly equipped, were properly refused. *Central of Georgia Ry. Co. v. Turner (Ala.)*, 661.

Duty of engineer. *Central of Georgia Ry. Co. v. Turner (Ala.)*, 661.

Mass. Pub. St., c. 112, § 115, requiring the fencing of railroad tracks, does not affect railroad's liability for injuries to horse left standing near track. *Gerry v. New York, etc., R. R. (Mass.)*, 751.

STOCK, INJURIES TO—Continued.**Presumption of Negligence.**

Certain testimony as to equipment of train and care exercised by engineer, etc., was not sufficient to overcome prima facie case and warrant direction of verdict for defendant. *Central of Georgia Ry. Co. v. Turner* (Ala.), 661.

Prima facie case for owner of cow killed by train. *Central of Georgia Ry. Co. v. Turner* (Ala.), 661.

Regulations approved by railroad commissioners, limiting speed of trains do not affect railroad's duty to one permitting horse to stand near track. *Gerry v. New York, etc., R. R.* (Mass.), 751.

Was not error to refuse to grant new trial, although the testimony of trainmen on the engine which killed the stock, if taken alone, may have made out complete defense. *Southern Ry. Co. v. Puryear* (Ga.), 751.

STREET RAILWAYS.

See CARRIERS OF PASSENGERS; CHILDREN; CROSSINGS; FEDERAL JURISDICTION; TICKETS AND FARES; TRIAL.

Accidents on Track.

Actionable negligence, question for jury. *United Rys. & Elec. Co. v. Watkins* (Md.), 641.

Actionable negligence was shown by evidence. *Finnick v. Boston & N. St. Ry.* (Mass.), 619.

Care due from motorman to other users of street with respect to speed and watchfulness, etc. *Peterson v. St. Louis Transit Co.* (Mo.), 732.

Certain findings of trial court were not inconsistent with a finding that each party to collision between car and highway traveler was in fault, and that the fault of the traveler contributed to the injury. *McCarthy v. Consolidated Ry. Co.* (Conn.), 685.

Certain instruction was objectionable, as tending to mislead jury when determining whether the insufficiency or negligence of driver of the carriage in which plaintiff was riding or the railway's failure to prevent the accident was its proximate cause. *Hanson v. Manchester St. Ry.* (N. H.), 675.

Certain section of ordinance was controlling as to right of way as between street car and fire apparatus responding to an alarm. *McBride v. Des Moines City Ry. Co.* (Iowa) 318.

Collision between wagon and car, instruction taking unlawful speed and the ringing of bell from jury, and charging that if defendant's motorman saw, or by the exercise of reasonable care would have seen, in time to have stopped the car, that an accident was imminent, and that he failed to exercise reasonable care to stop the car, defendant was liable, was proper. *Beier v. St. Louis Transit Co.* (Mo.), 281.

Collision between wagon and street car, negligence of railway was question for jury. *Beier v. St. Louis Transit Co.* (Mo.), 281.

Degree of care due from motorman to prevent collision with other users of streets at much frequented points. *Indianapolis Trac. & Term. Co. v. Kidd* (Ind.), 366.

Duty to stop cars upon first appearance of danger to other users of streets. *Peterson v. St. Louis Transit Co.* (Mo.), 732.

Equal rights of street car and highway traveler. *McCarthy v. Consolidated Ry. Co.* (Conn.), 685.

Instruction that jury must consider whether motorman was negligent in not stopping or checking speed of car, if he could have stopped it, was erroneous because not applicable to evidence. *McBride v. Des Moines City Ry. Co.* (Iowa), 318.

STREET RAILWAYS—Continued.

- It could not be said that car ran into cart, any more than that cart ran into car. *Dewez v. Orleans R. Co. (La.)*, 24.
- Lookout for pedestrians, care required of motormen. *McQuade v. St. Louis & Suburban Ry. Co. (Mo.)*, 727.
- Lookouts, care due from motormen to other users of streets. *Peterson v. St. Louis Transit Co. (Mo.)*, 732.
- Motorman had "last clear chance" of avoiding collision with pedestrian, and his failure to do so was its proximate cause. *Indianapolis Trac. & Term. Co. v. Kidd (Ind.)*, 366.
- Mutual rights and duties of company and individual using street. *United Rys. & Elec. Co. v. Watkins (Md.)*, 641.
- Negligence of motorman was question for jury. *Peterson v. St. Louis Transit Co. (Mo.)*, 732.
- Not error to set out ordinance, giving fire apparatus right of way, in instruction in which jury were informed as to legal effect of it. *McBride v. Des Moines City Ry. Co. (Iowa)*, 318.
- Petition alleging in one count that motorman failed to keep vigilant watch, etc., and also that he failed to stop car in shortest time and space possible, was not objectionable as alleging repugnant grounds of negligence. *McQuade v. St. Louis & Suburban Ry. Co. (Mo.)*, 727.
- Petition should have been construed to mean that the violation of the ordinance contributed with the other precedent acts of negligence charged in the petition to cause the injury and death, and not that they contributed with deceased's negligence to cause such injury. *McQuade v. St. Louis & Suburban Ry. Co. (Mo.)*, 727.
- Question for jury whether both driver of other vehicle and motorman were misled, each by act of the other, to judge that each was yielding right of way. *Weinberger v. North Jersey St. Ry. Co. (N. J.)*, 351.
- Railway has no superior right to use of streets on which its tracks are laid over rights of other users, except right of way when required. *Indianapolis Trac. & Term. Co. v. Kidd (Ind.)*, 366.
- Right of motorman to assume that person will keep out of danger. *Heying v. United Rys. & Elec. Co. (Md.)*, 673.
- Right of way as between car and other vehicle, sufficiency of evidence. *Weinberger v. North Jersey St. Ry. Co. (N. J.)*, 351.
- Right to recover because motorman could have seen deceased on crossing in time if he had exercised ordinary care. *McQuade v. St. Louis & Suburban Ry. Co. (Mo.)*, 727.
- Speed of street car may be negligent though it is ordinance speed or less. *Beier v. St. Louis Transit Co. (Mo.)*, 281.
- Speed ordinance must not be violated. *Peterson v. St. Louis Transit Co. (Mo.)*, 732.
- Where, in spite of plaintiff's negligence in selecting incompetent driver, defendant street car company by the exercise of care could have prevented injury to plaintiff in the position he occupied, in care of such driver, defendant's failure to do so constituted sole cause of the injury. *Hanson v. Manchester St. Ry. (N. H.)*, 675.
- Any contract exemption from legislative regulation of rates passed by street railway chartered before adoption of Texas Constitution of 1876, was lost by sale of its property on foreclosure, and the acquisition of its franchise, under municipal ordinance, together with that of another company, by a new corporation, incorporated since the adoption of such constitution, although such ordinance provides that all the rights and privileges previously granted to the old corporations were conferred on the new one. *San Antonio Traction Co. v. Altgelt (U. S.)*, 485.
- Constitutionality of Conn. act of July 1, 1895, imposing upon

STREET RAILWAYS—Continued.

street railway companies cost of paving and repairing that part of streets occupied by their tracks. *Fair Haven & Westville R. Co. v. New Haven (U. S.)*, 160.

Contributory Negligence.

Affirmative answer by jury to special question, "was the car at a full stop when plaintiff stepped or got off?" was not inconsistent with general verdict, since it would be inferred that the car was at a full stop when plaintiff "stepped," and not that it was stopped when he "got off." *Burke v. Bay City Traction & Electric Co. (Mich.)*, 758.

Care required of person about to cross street car track. *Finnick v. Boston & N. St. Ry. (Mass.)*, 619.

Care required of person walking on track. *Indianapolis Trac. & Term. Co. v. Kidd (Ind.)*, 366.

Finding that decedent could have remained where he stopped his horse, on approach of the car, is properly drawn from a finding that decedent on approaching track drove his horse at a walk, which gait was maintained until he saw and heard the car when he stopped horse from 6 to 10 feet from track. *McCarthy v. Consolidated Ry. Co. (Conn.)*, 685.

Finding that decedent saw and heard the car before he stopped his team before entering on track was properly inferred from proof that decedent had opportunity to see and hear car. *McCarthy v. Consolidated Ry. Co. (Conn.)*, 685.

Finding that driver of wagon was not guilty of was justified. *Finnick v. Boston & N. St. Ry. (Mass.)*, 619.

Individual who undertakes to cross track when no prudent person would do so cannot recover for injuries sustained in collision with car. *United Rys. & Elec. Co. v. Watkins (Md.)*, 641.

Negligence of person walking on track, if any, in not keeping constant lookout for approaching cars was remote and not proximate cause of her being struck by car, which approached from rear without warning at high speed, and was, therefore, no bar to recovery. *Indianapolis Trac. & Term. Co. v. Kidd (Ind.)*, 366.

Not negligence, as matter of law, to attempt to drive four-horse wagon across street car track when car approaching is a block distant. *United Rys. & Elec. Co. v. Watkins (Md.)*, 641.

Of driver of vehicle was question for jury. *Peterson v. St. Louis Transit Co. (Mo.)*, 732.

One who, on arriving at intersection of streets, looks, but, seeing no street car, proceeds to cross track, but, before crossing, looks again, and, though seeing car coming, tries unsuccessfully to cross before it arrives, is guilty of contributory negligence. *Heying v. United Rys. & Elec. Co. (Md.)*, 673.

Pedestrian was not bound to assume that she would be run into by car approaching from rear at excessive speed, in broad daylight, on straight track, without warning. *Indianapolis Trac. & Term. Co. v. Kidd (Ind.)*, 366.

Question for jury whether circumstances warranted attempt to drive vehicle across street car track in face of approaching car. *Weinberger v. North Jersey St. Ry. Co. (N. J.)*, 351.

Right of person about to drive over street car track to assume that motorman will not violate speed ordinance, and will perform the other duties owing to other users of streets. *Peterson v. St. Louis Transit Co. (Mo.)*, 732.

Right to attempt to drive across track in face of approaching car. *McCarthy v. Consolidated Ry. Co. (Conn.)*, 685.

Right to walk on street car track. *Indianapolis Trac. & Term. Co. v. Kidd (Ind.)*, 366.

STREET RAILWAYS—Continued.

Stop, look, and listen. *Finnick v. Boston & N. St. Ry. (Mass.)*, 619.

Was question for jury whether driver of vehicle, having acquired right to cross track first which he might judge must have been recognized by the motorman, might not have also reasonably judged that the stopping of the car showed such recognition, and whether the driver's crossing under those circumstances was negligent, and whether motorman's release of brakes was negligent. *Weinberger v. North Jersey St. Ry. Co. (N. J.)*, 351.

Evidence.

Certain questions as to condition of street adjacent to track on which plaintiff was walking when struck by car were objectionable as calling for opinion of witness. *Indianapolis Trac. & Term. Co. v. Kidd (Ind.)*, 366.

Collision between wagon and street car, expert evidence was not required to prove that car was going fast at time of accident. *Beier v. St. Louis Transit Co. (Mo.)*, 281.

Collision between wagon and street car, formal proof that car might have been stopped in time to avoid the injury was rendered unnecessary by the circumstances. *Beier v. St. Louis Transit Co. (Mo.)*, 281.

Proper to admit in evidence section of city ordinance providing that apparatus of fire department responding to an alarm should have right of way. *McBride v. Des Moines City Ry. Co. (Iowa)*, 318.

Proper to refuse to admit rules of fire department, intended for guidance of its members and issued only to them, in action for death of a member in a collision between hose wagon and car. *McBride v. Des Moines City Ry. Co. (Iowa)*, 318.

Mo. Rev. St. 1899, § 2864 providing for recovery of \$500 for death caused by negligence, etc., is applicable to street railways. *McQuade v. St. Louis & Suburban Ry. Co. (Mo.)*, 727.

Power to charter street railway was not withdrawn from legislature by Tex. Const. 1876, Art. 10, § 7. *San Antonio Traction Co. v. Altgelt (U. S.)*, 485.

SUNDAY LAW.

See MASTER AND SERVANT.

TELEGRAPH STATIONS.

See MASTER AND SERVANT.

TICKETS AND FARES.

See STREET RAILWAYS.

Changing money for passengers, reasonableness of carrier's rule for government of street car conductor. *Knoxville Traction Co. v. Wilkerson (Tenn.)*, 763.

Constitutionality of Texas statute requiring issue of half-fare street railway tickets to school children. *San Antonio Traction Co. v. Altgelt (U. S.)*, 485.

Expiration of Ticket.

Acceptance of ticket by one connecting carrier does not require another of such carriers to accept it; time for using it having expired. *Boling v. St. Louis & S. F. R. Co. (Mo.)*, 456.

Fact that one buying what she knew was special-rate ticket did not read it did not relieve her of effect of time-limit stipulation printed on its face. *Boling v. St. Louis & S. F. R. Co. (Mo.)*, 456.

Ticket agent at certain point was not agent of defendant carrier, so as to make it responsible for his mistake in punching ticket on passenger's arrival there, and telling her she could use it on later day. *Boling v. St. Louis & S. F. R. Co. (Mo.)*, 456.

TICKETS AND FARES—Continued.

Validity of stipulation fixing time for expiration of special rate round-trip ticket. *Boling v. St. Louis & S. F. R. Co. (Mo.)*, 456.

Making change for street car passengers, power of carrier to fix limit. *Knoxville Traction Co. v. Wilkerson (Tenn.)*, 763.

Mileage Books.

Constitutionality of Virginia act of March 15, 1906. *Commonwealth v. Atlantic Coast Line R. Co. (Va.)*, 1.

Jurisdiction of corporation commission to pass on constitutionality of mileage book act. *Commonwealth v. Atlantic Coast Line R. Co. (Va.)*, 1.

Power of carriers to fix fare and time, place and manner of payment. *Knoxville Traction Co. v. Wilkerson (Tenn.)*, 763.

TRESPASS.

Where railroad gives city permission to take water from wells on land of private person, and enters into contract with city requiring city to indemnify it against all damages which may accrue by reason of use of the wells by city, the owner of the land is entitled to recover from railroad any damages which he shows himself entitled to recover for the appropriation of the water by the city. *Couch v. Texas & P. Ry. Co. (Tex.)*, 406.

TRESPASSERS.

See CHILDREN.

Care due trespassers on railroad tracks before and after discovery of their peril. *Chesapeake & O. Ry. Co. v. Farrow's Adm'r (Va.)*, 360.

Lookouts.

Care due from trainmen to licensees or trespassers. *Johnson v. Louisville & N. R. Co. (Ky.)*, 658.

Duty of trainmen in cities and towns. *Johnson v. Louisville & N. R. Co. (Ky.)*, 658.

Trespasser or licensee in railroad stock-yards, duty of company. *Johnson v. Louisville & N. R. Co. (Ky.)*, 658.

TRIAL.

See CROSSINGS; NEGLIGENCE; STREET RAILWAYS.

Finding of trial court, in action against street railway company for death of traveler in a collision with car, that each party to the collision was in fault and that the fault of decedent contributed to the injury, is a conclusion of fact, and must stand, unless inconsistent with other facts found. *McCarthy v. Consolidated Ry. Co. (Conn.)*, 685.

Unjustified comment by counsel upon witnesses should be restrained by trial court, and may be required to be retracted. *Minard v. West Jersey & S. Ry. Co. (N. J.)*, 327.

VENUE.

Under Ky. Civ. Code Prac., § 73, where intestate was killed while passing over railroad track, venue of an action by his administrator was governed by residence of intestate. *Illinois Cent. R. Co. v. Willis' Adm'r (Ky.)*, 312.

VICE PRINCIPALS.

See FELLOW SERVANTS; MASTER AND SERVANT.

WANTONNESS.

See CROSSINGS.

WILLFULNESS.

See CROSSINGS; MASTER AND SERVANT; NEGLIGENCE.

